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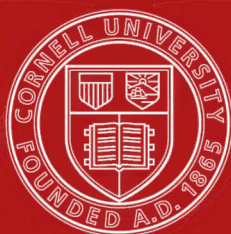
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Leading cases in the law of real propert



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LEADING CASES
IN THE
LAW OF REAL PROPERTY

DECIDED IN THE AMERICAN COURTS.

With Notes

BY

GEORGE SHARSWOOD, LL.D.,

AND

HENRY BUDD,
OF THE PHILADELPHIA BAR.

VOL. II.

NOTES BY HENRY BUDD.

PHILADELPHIA:
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PREFACE TO VOLUME II.

THE editor is aware that a preface to the second volume of a book, even when the volumes are issued at different times, is unusual, but the circumstances of the present case are of an exceptional character.

When this work was begun the editor was associated in his labors with one now, alas! no more—a great lawyer, a profound and elegant scholar, a distinguished judge; and while, by the terms of the agreement between the publisher and the editors, all the actual writing of notes was to be done by the junior editor, still each note of the first volume, before it was sent to the printer, was submitted to the senior editor, and was read and approved by him. The remainder of the work has been deprived of the great advantage of Chief-Justice Sharswood's supervision, and the editor has lost the great moral support given to him thereby, and, therefore, must submit this and the succeeding volumes to the judgment of the profession, with an anxiety much greater than would have been the case had they been passed upon before publication by one to whose judgment almost all would bow. The same plan, however, which was agreed upon and pursued in Chief-Justice Sharswood's lifetime has been followed in the portions of the work constructed since his death.

In this, the last work undertaken by the late Chief-Justice, it may not, it cannot, be altogether out of place for one who

feels deeply the loss, both to the community and to himself, to say something of his career—to give a brief *resumé* of his life and services.

Born in the city of Philadelphia, in July of the year 1810, George Sharswood was graduated Bachelor of Arts by the University of Pennsylvania, and in due time came to the Bar. During his first years at the Bar, his experience was that of patient waiting, and hard study of law, political economy, science and belles-lettres, together with some attention to active politics. He served two terms in the lower house of the legislature; namely, in 1837–8 and in 1842–3. In the spring of 1845 he was appointed by Governor Shunk a judge of the District Court of Philadelphia, a court in which was transacted nearly all the common-law business of the city and county of Philadelphia. In 1848 he became President of the Court. The work done by Judge Sharswood in this position was of the most important and valuable character; he was the very ideal of a *nisi prius* judge, and in *banc* with his brethren was always a leading mind. When he assumed the chiefship of the Court, it was burdened with arrears; when he left it, although during the whole of his term of service he never had more than two associates, the arrearages amounted only to the ordinary annual arrears, such as no court can avoid, and the cases were not merely decided, they were well decided. The reports of his time in that court do not show upon their pages mere judgments, but decisions upon the law, establishing and applying principles; and when we recollect what a period of development has been the time since 1845, how many new industries have sprung into existence, how many mechanical appliances have come into use, with consequences of a character hardly dreamed of in the wildest

flights of the imagination, and remember, also, how the law has tried to keep pace with all these developments, and how old principles have had to be adapted to the altered state of affairs, we can see what a tax there was laid upon the judges sitting in the most important court of a large and growing city, and what manner of man was required to meet the demand made upon the judge of such a court. Then, too, during the time that Judge Sharswood was upon the District Court bench, the late civil war took place, and brought with it all those interesting questions of law which arose out of it. Perhaps his best known opinion on, what we may call, war-law is his dissenting opinion in *Borie v. Trott*, 5 Phila. Rep. 566, in which, early in the discussion of the constitutionality of the legal tender acts, he reached the conclusion afterwards arrived at by the Supreme Court of the United States in 1869; and though that court, after a change in the composition of its bench, reversed its decision by a majority of one, yet it is hardly too much to say that the majority of those really learned in the law in this country regard the court's first opinion as the correct one. In 1867, President Judge Sharswood became a justice of the Supreme Court of Pennsylvania, and while his fellow-citizens rejoiced in his promotion, yet they felt his loss to the bench of Philadelphia to be irreparable; and certainly, notwithstanding that we have several very able gentlemen on the bench in this city, no one has yet arisen who fills his place—no one who combines his great knowledge of law, quickness of perception, and untiring industry.

It is from a time just after Judge Sharswood's accession to the Supreme bench that the distinct remembrance of him by the present writer begins. He had heard of Judge

Sharswood, and revered him from early youth, but the Judge first became to the writer a bodily presence when, a law student, straying around the courts to pick up cases of interest, he saw Mr. Justice Sharswood sitting at *nisi prius* in the case of *The Commonwealth v. Snowden* [reported in 1 Brewster's Reports 218]. How the student became acquainted with the Judge he does not exactly remember; but he has a distinct recollection how, shortly after his admission to the Bar, when sitting in his office, one day, the door opened and the tall form and kindly face of Judge Sharswood entered, causing amazement as well as delight; and that visit, the honor of which was indeed felt, was of a piece with the uniform kindness of which the writer has been a recipient from the late Judge.

Judge Sharswood's opinions in the Supreme Court are found in the Pennsylvania State Reports from 7 P. F. Smith (57 State Reports) to 6 Outerbridge (102 State Reports). His written opinions while Judge and President of the District Court are said to have been five thousand in number; many of those delivered after 1850 may be found in the Philadelphia Reports, Vols. I. to VI.

In 1878 he became Chief-Justice; in 1882 he retired from the bench, his term of office having expired. On his retirement he was the recipient of a dinner given by the Philadelphia Bar in the foyer of the Academy of Music, and many were the heartfelt wishes that this good and really great old man, the faithful judge, the true gentleman, might be long spared to enjoy a rest and repose which had never been his during his life; but the wishes were not to be granted—at least, in the sense in which those assembled around the table intended them; their guest was to have repose, indeed,

but not upon this earth or in this world. But a few months after, on his way home from a meeting of the trustees of the University of Pennsylvania, he was seized with a fainting feeling; he rallied and got to his house, but he never left it again alive. His life and his life work ended strangely close together.

Nothing has been said so far of Judge Sharswood's work other than as a judge; but he by no means confined the benefits he bestowed upon the community to those which flowed from him as a magistrate. He was a successful educator of the young in the profession of his choice; in 1850 he revived the Law Department of the University of Pennsylvania, which had been established by Judge Wilson in 1790, but operations of which had become suspended, and was a professor therein until 1867, and subsequently for a short time filled a chair during an emergency. He was an industrious legal author and annotator. His edition of Blackstone is probably the best known edition of that writer in this country; his *Legal Ethics* is an invaluable gift to the profession—would that the high principles inculcated therein could be written indelibly in the heart of every youth when he comes to the Bar and takes the oath; his editions of English text-writers are most numerous—Adams on Equity, Russell on Crimes, Byles on Bills, Starkie on Evidence, are a few of the names of works which at once occur as having received his attention; besides, he was editor of at least one legal periodical, and in addition to all these he was active in matters which call upon the public-spirited citizen for his services, and to the day of his death kept up a constant course of reading and study of all kinds—law, morals, politics, belles-lettres, history, archæology, and theology, in which last-mentioned science a dis-

tinguished Roman Catholic ecclesiastic, himself a theologian of the highest order, has said Judge Sharswood was the best versed layman he had ever met.

Surely this little sketch has shown that the work done by George Sharswood was the work of a giant, and we may think needed a giant's frame to support it; but, physically, the man who did the giant's work was no giant—he was a man in delicate health. When he went on the Supreme bench he was a confirmed invalid, suffering from a painful disease, and often have we of the Bar seen him pace up and down as if to relieve himself, in a degree, of pain. But the man's mind overpowered his weak body; he forced it, as it were, to hold out; his conscience kept him to his work, whether public or private, and the result of the long, hard work of a lifetime is seen.

Personally, the Judge was as admirable as in his works—kind, gentle, always willing to listen to the views of others, but uncompromising in his opinions when formed after mature deliberation, and, in spite of his exalted position and great accomplishments and abilities, one of the most modest men imaginable; socially, he was geniality itself, and never above taking a warm interest even in the trivialities of social intercourse—he seemed, indeed, to fill out the measure not only of a judge and a scholar but of a man.

PHILADELPHIA, December, 1884.

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LEADING CASES

IN THE

LAW OF REAL PROPERTY.

Base, Qualified or Determinable Fee.

SCHEETZ v. FITZWATER.

Supreme Court of Pennsylvania. Argued, March 29 and 30, 1847; decided, April 12, 1847.

[Reported in 5 Pennsylvania State Reports 126.]

A sheriff's sale of A., with its appurtenances, passes the title of the tenant of A. in B., which he held by adverse possession for a period short of twenty-one years, and used in connection with A. as one farm; B. having formerly been the site of a mill-pond appurtenant to a mill on A., but that right having ceased, under the provisions of the grant, by disuser. E. conveyed to L. a mill-dam, or pond of water, with the site or soil of said pond, for the use and service of a mill, (on the land of L.,) and for no other use whatever. In 1817, L.'s assignee drained the pond and cultivated the reclaimed land, with the tract on which the mill stood, as one farm. In 1833, his title to the mill tract, with its *appurtenances*, was sold by the sheriff: *Held*, L.'s title to the soil of the mill-pond was a base fee, determinable on disuser as a pond, when it reverted in the assigns of E., under a conveyance of the *reversion*. Until a notorious user for a different purpose than was limited in the deed, L. and his assigns had no *possession adverse* to E. and his assigns. That the possession of L.'s assignee, after the disuser as a mill-pond, passed, by force of the word *appurtenant*, with the mill tract to the sheriff's vendee, and he could tack his subsequent adverse possession to that of the defendant in the execution, to make up the time required as a bar by the statute.

IN error from the Common Pleas of Montgomery county.

March 29, 30. This was an action of trespass by the plaintiff in error, in which the title to the *locus in quo* was the question. The plaintiff claimed title by a deed in 1746, from Emlen to Lardner, conveying "*a certain mill-dam or pond of water, and mill-race or stream*

of water, issuing and proceeding from the said mill-dam, or pond of water, as the same is now situate, and being in and upon a certain tract or parcel of land situate in the manor of Springfield, together also with the site and soil of the said mill-pond or dam, and race of water, and also one perch of land on each and every side of the said pond, or dam and race of water, to and for the use and service of a certain mill, with the land thereto belonging, and for no other use whatsoever. The said perch of land to be taken and laid out from the centre or middle of the said mill-race, and from the edge of the water round or on the outside of the said pond, if his, the said George Emlen's land shall extend one perch beyond the said dam or pond, or otherwise, so far as the said George Emlen's land doth extend beyond the said pond, not exceeding one perch; *And also*, full and free liberty and privilege to and for the said Lynford Lardner, his heirs and assigns, of egress and regress to and from the said mill-pond and race, to repair, support, and maintain the same for the use and service of the said mill. [The liberty and privilege of making bridges, and hedges or fences across the said mill-race, and of passing and repassing over and along the same, to and from the adjacent land of the said George Emlen, so as such bridges, hedges or fences, do not obstruct, hinder, or prejudice the same race or pond of water, or either of them, excepted and hereby reserved to the said George Emlen, his heirs and assigns.]”

On the same day, and for the same consideration, Lardner conveyed to Emlen five acres of land, “excepting and always reserving unto the said Lynford Lardner, his heirs and assigns, out of this present grant and release, a certain mill-race or stream of water running across the hereby granted land to and for the use and service of his, the said Lynford Lardner's paper-mill, and also the site and soil of the said mill-race or stream, together with one perch of land along and on each side of the said mill-race or stream of water with full and free liberty and privilege to and for the said George Emlen, his heirs and assigns, to make one or more bridge or bridges over the said hereby excepted mill-race, so as not to prejudice, obstruct, dam up, or divert the same race or stream of water.”

Lardner's title to the mill, “together with the mill-dam, mill-race, and pond of water, and the site, soil, and privileges,” became vested in Scheetz, the elder, who devised to Justus Scheetz. The site of the mill-pond, in which the trespass was committed, is now in *Dublin* township.

In 1834, the sheriff, under a judgment and execution against Justus Scheetz, levied on and sold to the present plaintiff the mill and tract of land, containing ninety-four acres in *Springfield* township, with the *appurtenances*. The plaintiff gave evidence that a tenant of Emlen's land, (now owned by defendant,) about forty years before this action, had put up and repaired the fence around the margin of the mill-pond, as it then stood. About 1817, Justus Scheetz dug a trench through the pond, which had become in part filled up, thereby draining a large portion of the former site. It was shortly after this that he commenced ploughing and cultivating it, which was continued by the sheriff's vendee.

In 1812, the heirs of Emlen conveyed to Stackert the tract out of which the site of the mill-pond had been granted, "with the reversions and remainders," etc., "excepting and always reserving nevertheless, out of this present grant, all and every such parts and parcels of the lands and premises herein above described, and all the waters, mill-dam and mill-race, water-courses, rights of soil, lanes, passages, rights and privileges whatsoever, which any person or persons whatsoever, according to the original grant to George Emlen, the father of the said Caleb Emlen, deceased, or by any deed or writing under the hand and seal of the said George Emlen, (or of the said Caleb Emlen, if any,) are seized of or entitled thereto."

The action was brought in 1842, for taking grass from the site of the mill-pond, which had been drained and converted into meadow. There was conflicting evidence as to defendant's acts of ownership and possession, which was left to the jury under instructions by the Court (KRAUSE, P. J.) on the following points of law arising thereon. As to Emlen's deed to Lardner, they said, "that it conveys land, and not merely an easement or incorporeal hereditament, by the words 'site and soil,' they being as strong to convey land, as the words 'debts, dues, and demands, real, personal, and mixed,' coupled with 'heirs and assigns,' are to convey the fee; and these latter words have been held, 12 Serg. & Rawle 269, to convey a fee-simple in land. And the thing granted is not so vaguely described as to fall under the censure of *Stambaugh v. Hollabaugh*, 10 Serg. & Rawle 357; but rather within the cases cited by Mr. Justice Duncan as good, viz.: 'a moiety of a yard of land lying in a great waste—' and 'twenty acres, parcel of the grantor's land—' But Emlen did not convey a fee-simple estate in that land. He conveyed

a qualified fee, determinable on the abandonment by Lardner, his heirs or assigns, of the use and service for which the conveyance was made, as stated in his deed. And in conveying such limited fee, he retained the reversion in himself; and that he could permit to descend, or sell to others. To convey such limited fee, and to retain the reversion, was his intention, as the Court collects it from his deed; and such intention of the grantor, when legal, is the governing principle in construing conveyances; 4 Dal. 347; 3 Watts & Serg. 303; 2 Binn. 537, 544. Lynford Lardner therefore acquired an estate in this pond and mill-race as land to be held by him, his heirs and assigns, so long, and no longer, as he or they continued to use them for the purpose stated; and necessarily they reverted to Emlen, or his heirs or assigns, as the case might be, whenever that purpose was abandoned, and the land was subjected to other uses."

And further: "That the right of way to support, repair, and maintain this dam and race is an appurtenance to them, the grant being entire, and inclusive of all for the same 'use and service;' and therefore, if the dam, and the site, and soil have been abandoned as a use and service of the mill described, all that is contained in the grant, reverted together, to Emlen, his heirs or assigns, from the date of such abandonment."

That if the clearing, etc., was commenced by Justus Scheetz in 1817, there the use and right, being diverted from the purposes of the original grant, reverted and became vested in Emlen or his assigns, and the present plaintiff did not acquire it as an *appurtenant* to the mill; and, unless it was included in the levy by the sheriff, it did not pass at all. That the recital in Emlen's deed to Lardner was notice, and the purchaser was bound by its restrictions. Therefore the plaintiff could not tack his adverse possession to that of Justus Scheetz, and if that commenced in 1817, that point was out of the case; since his possession was interrupted by the plaintiff, under the levy and sale, before it had been continued adversely for twenty-one years. As to Scheetz's possession prior to 1817, it was not hostile unless he had done some act, and shown a clear intention to abandon the right under the Emlen deed, and the limitation there prescribed; until then, he held under one title with Emlen, both together constituting one fee-simple, and Emlen having an interest which would sustain an action for a permanent injury to the freehold.

The errors assigned were, in the construction of Emlen's deed; in

ruling that the sheriff's vendee did not purchase this tract, if the use for the mill was then abandoned, and it was not included in the levy; and as to the effect of the possession prior to the user for other purposes than those designated in the deed; and that Emlen's title was vested in the plaintiffs, if there had been such an abandonment.

The cause was argued at December Term, 1845, by *G. R. Fox* and *Fox*, for plaintiffs in error, and *Freedley*, contra.

At this term it was again argued by *G. R. Fox* for plaintiff, and

Meredith, for defendant.

For plaintiff it was said, that the conveyance of the water right and of the land were distinct; the former was for the use of other land, on which the mill stood, while the land was in no way connected therewith, but was absolutely granted. The estate was not conditional, *ea intentione* in a feoffment will not create a condition; 2 Tho. Co. p. 9; to do that the words must be clear; *Cook v. Trimble*, 9 Watts 16. It was insensible and void, unless the distinction taken above was adopted, for in no way could this land, as land, be used for the purposes of a mill. It is against the policy of the law, for it is prohibiting cultivation, and compelling the grantee to retain it, as a bog forever; all such restrictions are void conditions; Touch. 130, 132; 2 Tho. Co. 29; 4 Dane's Abr. 156; 2 Cruis. 8. If a condition, it is subsequent, and therefore to be construed strictly, as it divests an estate; Co. Litt. 205 b, 219 b, 220 a; 8 Rep. 91; 18 Ves. 56; 5 Vin. Abr. 145, pl. 27; 2 Tho. Co. p. 1, n. a. Such clauses, if doubtful, are construed as covenants; 4 Kent 132. If a condition, it is not broken, for it is as much annexed to the land as to the mill. If broken, an entry is essential; 2 Tho. Co. 87, n., L. 2; 2 Bl. Com. 155; 4 Kent 127; and that is confined to the grantor, and he must go there. [*Per Curiam*.—Would it not return as alluvium, had the water dried up, for here is no further grant than of the pond?] The plaintiff, under the sheriff's deed, took all the land of the defendant, which he was using as appurtenant to the tract or farm levied on; 7 Serg. & Rawle 177. Land may be said to be appurtenant to a house after user for a convenient time; 3 Salk. 40; and ten or twelve years is said to be a convenient time; 2 Vin. Abr. 599, pl. 42. *Appertaining* means, usually, occupied or used with it; Plowd. 169, 170; *Hall v. Benner*, 1 Penna. Rep. 407; 1 Tho. Co. 241.

For the defendant it was said, the rule that the words of the deed are to be taken most strongly against the grantor, is confined to deeds poll; Touch. 52, by Prest.; for in indentures, as here, they are the words of both parties. The plain design was an ownership for a particular purpose; it never could have been intended to give the right to use a small piece of land in the centre of the farm for any purpose the grantee might choose; thus destroying the value of the residue. A qualified or base fee leaves a reversion where there is no limitation over, which may be granted. Touch. 132 shows what words make a condition; *ea intentione*, if to do a thing connected with the land do make a condition; if collateral, it may be otherwise. Here, too, there is no right of way for the purposes of the *land*, but simply to cleanse the race and pond; and the grantor reserved the right to exclude all others; 1 Cowp. 600. As to the reëntry, defendant was in possession claiming a right. Where the right to avoid for the breach is given to another than the heir, as a younger son, it is construed a use; 4 Leo. 2; Touch. 514; and instances of a similar *use* with the present are given, p. 517. So is a dedication for a street, a square, etc. The rule is now well settled, that the object is to discover the intention and enforce that; *Wellington v. Wellington*, 1 W. Bl. 645; *Parkhurst v. Dormer*, Willes 332. [ROGERS, J.—If it be a base fee, an avoidance will be of the whole.] The doctrine of uses avoids that difficulty. [Ch. J.—How can there be a *use* for a mill? BELL, J.—A use is always for the person.] As to the statute. There may be a tacking of two successive possessions in Pennsylvania, it is true, but there must be unity of title. Here there is no such unity. You are asked to put such a construction as will work a wrong.

If this land was held by a wrongful possession, contrary to the deed, clearly it cannot be appurtenant to the mill, because it was in that case held as *land*; but if held under the deed, and it did pass as an appurtenant, then it was as a water right, and there has been no adverse possession, nor any right but that given by the original deed, which was an easement or privilege of flowing water.

April 12. GIBSON, C. J.—There is only one assignment of error in this record, which is sustained; and the other points are left to stand on the reasons of the judge, which seem to be satisfactory. He erred, however, in charging that the adverse possession of Justus Scheetz did

not pass to the plaintiffs by the sheriff's deed. In *Overfield v. Christie*, 7 Serg. & Rawle 177, in which the opinion of Judge Washington in *Potts v. Gilbert*, 3 Wash. C. C. R. 475, was overruled, it was settled that the adverse possession of an occupant without right might be transferred to a purchaser, and continued by him for the residue of the time necessary to form a bar by the statute of limitations, and this principle the judge did not controvert. His position—and it is one of which it is difficult to explain the fallacy—was that the *locus in quo*, having reverted, did not pass by the sheriff's deed, which conveyed no more than the tract to which it had ceased to be appurtenant; and consequently, that it did not pass the adverse possession. But the possession may be passed without the title. The deed professed to pass the appurtenances belonging to the tract; and if the *locus* had not ceased to be occupied as an appurtenance, though the title to it were gone, the deed would pass the occupant's possession of it, as it would have passed the title to it had the occupant still held it. A proprietor who occupies his neighbor's land as a part of his farm, may certainly transfer his possession of the whole by a conveyance of the farm. Such is the principle of *Overfield v. Christie*, which is different from this case only in the immaterial respect, that there the conveyance was made by the occupant to the purchaser. But a sheriff's deed passes all that the debtor could convey, and is necessarily as operative in every respect. There was, however, evidence of entry to be left to the jury, as well as other considerations in the cause, which may yet, perhaps, avoid the statutory bar.

Judgment reversed, and *venire de novo* awarded.

LORD COKE said, Co. Litt. 1 b, "Of fee-simple it is commonly holden that there be three kinds, viz., fee-simple absolute, fee-simple conditional, and fee-simple qualified, or a base fee;" and although his lordship finds fault with that division, and continues, "but the more genuine and apt division were to divide fee, that is inheritance, into three parts, viz., simple or absolute, conditional, and qualified or base," yet the first division may be said to prevail even at the present day; and although, as Coke points out, the word simple "properly excludeth both conditions and limitations that defeat or abridge the fee," and, therefore, the expression fee-simple absolute is tautological, still the habit of the profession to regard and speak of an estate

which is limited to one and his heirs general, and which may, by possibility, endure forever, as a fee-simple, without reference to the possibility of its defeat, is so fixed, that the addition of the word absolute, to exclude the idea of such latter possibility, and to emphasize the character of an unconditional fee-simple, has become useful and generally recognized.

According to Blackstone, "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of said manor, should be peers of the realm by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seignory of this manor the dignity was at an end. The estate is a fee-simple because it is limited to the heirs general, and may, by possibility, endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee." 2 Blacks. Com., p. 109. The same language, very slightly modified, is used by Stephens, in Vol. I. of his Commentaries, p. 239. The examples given by Blackstone are from Co. Litt. 27 a, and to them may be added the instance, drawn by Hargraves from Sir Matthew Hale's manuscripts, of the gift by Henry III., "*Manerium de Penreth et Sourby Alexandro regi Scotiæ et heredibus suis regibus Scotiæ.*" Alexander died, leaving daughters only, and no heir king of Scotland, whereupon King Edward I. recovered seizin. Other and more modern instances will be remarked as we proceed with the subject.

Enlarged and Restricted Use of the term Base Fee.

A distinction is sometimes made which confines the expression base fee to the estate which arises in the grantee, where a tenant in tail conveys by bargain and sale to one and his heirs, see Steph. Com., Vol. I., p. 239, *note*, Tudor, Leading Cases, p. 745, and Stat. 3 & 4 Wm. IV., c. 74, and other cases in which the estate designated is derived from a tenant in tail, see *Walsingham's Case*, Plowd. 547; but we shall follow the example of Kent, 4 Com. 9, and use the term base fee as interchangeable with qualified or determinable fee, for the distinction is rather refined and fanciful than real, when we consider merely the character and condition of the estate held by the grantee. The essential characteristic of the estate is that it is depend-

ent for its existence and continuance upon the concurrence of collateral circumstances, and it makes no difference as to its character whether the circumstance upon which a particular estate depends be the continued existence of a certain line of descent, or the continued possession by the grantee and his heirs of a certain manor, or the continued use of the granted premises for the purpose to which they were devoted by the deed creating the estate.

When, indeed, we consider the estate of the grantee with reference to the course to be taken by the land after the estate granted ceases by the failure of the condition, there is a more substantial reason for the distinction mentioned, since in the case of a base fee, in the strict sense, when the failure of issue of the tenant in tail occurs, the estate of his grantee will at once cease, and the land will revert to the original grantor of the estate tail; while in the case of a base, qualified, or determinable fee, in the more enlarged use of the term, the land granted may, on the failure of condition, revert either to the original grantor, in case the estate is a strict base fee, or to the immediate grantor in case the determinable or qualified nature of the estate is derived from any circumstance other than its being the grant of a tenant in tail. This difference as to the reversion, it is thought, however, is hardly important enough to require the fee which arises from the conveyance of a tenant in tail, to be treated ordinarily as a distinct estate from the qualified or determinable fee.

Distinction between Base Fee and Estate on Condition Subsequent.

Mr. Washburn, in his work on real property, confuses the base fee with an estate on condition subsequent, and, indeed, diverts Blackstone's and Coke's example from its original use, and makes of it an example of an estate on condition subsequent. In Volume I., p. 62, he follows Blackstone; but in Volume II., p. 446, he says: "An instance of a condition subsequent would be a grant to A. and his heirs, tenants of the manor of Dale, or to B. so long as she should remain a widow."

Now the distinction between a base fee and an estate on condition subsequent is not only recognized by authority, but is well founded in reason, resting on the broad distinction between a condition and a limitation (for which see Volume I., p. 188), and we take it to be this: that in the case of an estate on condition subsequent, when it is once vested in the grantee, the estate can be destroyed only by a concurrence of two things, one of which is an active proceeding on the part of the grantor or his representatives—there must be a breach of the condition and an entry to take advantage of the forfeiture; whereas in the case of a base

fee, the condition, if we may so call it for convenience, or the circumstance upon whose existence or non-existence the estate depends, enters into the limitation itself, becomes an integral part of the very estate, and when the state of affairs upon whose continuance the estate is conditioned and limited comes to an end, the estate itself *ipso facto* ceases. See 4 Kent Com. 129. This distinction is lost sight of not only by Mr. Washburn, but in some decided authorities. Thus in *Memphis and Charleston R. R. v. Neighbors*, 51 Miss. 412, there was a deed to a railroad company, "for the only proper use of said railroad company in the construction of warehouses, water stations, machine shops, wagon yards, and for other depot purposes generally;" in *Carter v. Branson*, 79 Ind. 14, the habendum of the deed was "To have and to hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes; then said premises to fall back to the original tract;" and in *Indianapolis, Peru and Chicago Railroad v. Hood*, 66 Id. 580, the deed, after reciting that the consideration of the grant was the permanent location of the depot of the railroad company on the lots granted, conveyed the same "for a site for the depot . . . to have and to hold the premises aforesaid, with the appurtenances, to the said party of the second part *for the purposes aforesaid*." Each one of these limitations would certainly seem to create a base or qualified fee, but the Court in each case spoke of the estates as on condition subsequent, and in *Carter v. Branson* held that in order to divest the estate a reëntry was necessary.

Distinction between Base Fee and Conditional Limitation.

It is, perhaps, more difficult to distinguish between a base or qualified fee and a conditional limitation, but the distinction seems to be this: that on the expiration of a base fee the estate reverts to the grantor, while in the case of the conditional limitation it is limited over on its expiration to a third person. 4 Kent Com. 127; *Towle v. Remsen*, 70 N. Y. 303.

Classes of Base Fees.

The qualification which may be attached to a base fee may be of one of two kinds. It may be a qualification which attaches itself to the use of the land itself, so that the estate is held to be granted for that use and purpose only, so that on the cessation of the use the estate expires; or it may be one which is concerned with the happening of a more strictly collateral event, leaving the use of the estate free for any purpose, but limiting its existence only by the event contemplated, or to the continuance of the state of affairs contemplated at the time of the grant.

Of the first class, we have examples in cases where land is granted for school purposes, or the purpose of a school-house. *Board of Education of the Village of Van Wert v. The Inhabitants, Edson et al.*, 18 Oh. St. 221; *Kirk v. King*, 3 Pa. St. 436; *Broadway v. State*, 8 Blackf. 290; for the purposes of a mill or dam, *Scheetz v. Fitzwater*, 5 Pa. St. 126; for the erection and maintenance of public buildings, *Bolling v. Mayor, etc., of Petersburg*, 8 Leigh 224; for the purposes of a canal, *State v. Brown*, 3 Dutch. 13. This last case appears as reversed, *sub nomine Brown v. Morris Canal and Banking Co.*, in the same volume of reports at page 648, but the reversal was not upon any point which affects the subject of this note. See *Hoboken Land and Improvement Co. v. Mayor, etc., of Hoboken*, 36 N. J. Law, at page 550.

Of the second class, in addition to the examples already given on p. 18, may be mentioned a limitation to one person and his heirs, so long as another has heirs of his body, *Edward Seymor's Case*, 10 Co. 97 b; until the marriage of a certain person shall take place, 4 Kent Com. 9; to A. and his heirs, citizens of Virginia, 2 Minor's Inst. 86 [77]; "until Gloversville shall be incorporated as a village," *Leonard v. Burr*, 18 N. Y. 96.

In *Brian and Camson's Case*, 3 Leon. 117, it is said, "If I give lands to one and his heirs, so long as he hath heirs of his body it is a fee-simple determinable, and not an estate tail," but to this is added "Quare of that." Notwithstanding, however, this *quare* of the old reporter, a similar limitation has in a quite recent case been held to be a fee-simple determinable. See *Gibson et al. v. Hardway et al.*, 68 Ga. 370. In that case the testator by his will gave certain tracts of land to his two daughters, to whom he had made other bequests also, and then continued, "and should either or both of my two daughters aboved named die without child or children, then all the legacies given them in this item shall vest in and be considered as my estate." The Court held that the limitation created a determinable fee, JACKSON, C. J., saying, "Should either die, leaving no child, then the fee-simple is defeated, and the reversion takes place. So that the estate is a fee-simple estate defeasible upon the daughters dying without issue." It is, however, worthy of remark, that the Court was influenced in its decision by the use of the word "then," also by the fact that under the law of Georgia the creation of an estate tail was forbidden, and by the rule that the law will never presume an illegal intent on the part of a testator where a construction consonant to law may be given to his words.

In *Lee v. Shivers*, 70 Ala. 288, an estate given by will to R. H. Lee, and qualified as follows: "It is my will . . . if my sons or either of them . . . should die without children or a child . . . or if they or either of them should die leaving children or a child, and such children or child should

die without a child or children, then and in that event the real estate . . . of such as may die without children . . . shall go to the surviving trustees of said sons or their children," was spoken of, in the opinion of the Court, as a qualified or determinable fee. But this, it is thought, is rather the case of an executory devise.

Manner of Creation of Base Fee.

A base, qualified, or determinable fee must be created by deed, by will, or some instrument of writing known to the law, and the same instrument which gives the estate must express the limitations thereto. *Union Canal Co. v. Young*, 1 Whart. 410. The base character of the estate granted cannot be established by parol evidence of the intention of the grantor in making or of the grantee in receiving the grant, *Adams v. County of Logan*, 11 Ill. 336; or by evidence of collateral circumstances, see *Seebold v. Shitler*, 34 Pa. St. 133; nor will a base fee be established where there is a collateral writing showing that the intent was that the land should be applied to certain purposes. Thus in *Kerlin v. Campbell*, 15 Pa. St. 500, it appeared that in 1789 the Legislature of Pennsylvania passed an act authorizing certain persons to take a conveyance of certain property "for the use of the inhabitants of the said County of Delaware, to accommodate the public service of the said county." A deed was subsequently made by the owner of the property to the said trustees, their heirs and assigns, with a clause of general warranty. On the same day the trustees executed a declaration of trust, which, after referring to the deed and the act, continued: "The said recited indenture was so made and intended to us in trust and for the use of the inhabitants of the said County of Delaware, to accommodate the public service of the said county, according to the intent and true meaning of the said recited act of Assembly; and we do hereby further declare and acknowledge that we do not claim to have any right or interest in the said court-house, prison and work-house, and the lot or lots of land thereunto belonging, or in any of them, to our own separate use or benefit, by the said indenture or conveyance so made to us or otherwise, but only to and for the uses and services hereinbefore mentioned, expressed, and declared, and to and for no other use, interest, or purpose whatsoever." It was argued that Kerlin, the grantor, had agreed to sell for public uses only, that the two deeds of the same date made in pursuance of the provisions of the act of Assembly declared the intent of the parties, and should be construed together, the effect of which would be to convey a base fee, determinable when the public uses recited ceased; but the Court said: "The two deeds, though executed at the same time, were as

diverse as if the latter were a conveyance of the legal title to a stranger, with whom the grantor in the first could not be in privity. There could be no resulting trust, for every part and particle of the grantor's estate, legal or equitable, present or prospective, had passed from him, and was paid for. Nor was the estate granted a base fee. It was unclogged with conditions or limitations." And see *Armstrong v. Board of Commissioners*, 4 Blackf. 208; and the remarks of the Court in *Adams v. County of Logan*, 11 Ill. 336.

In some of the States it is held that, under statutory provisions for the dedication of lands by the owners thereof to public use, the filing in the proper office of a plat or plan, showing the reservation, would constitute a conveyance for the purposes therein named, expressed, or intended, and for no other use or purpose whatever. Act of Ohio, March 3, 1831; *Board of Education v. Edson*, 18 Oh. St. 221; Illinois Rev., 1845, Ch. 25, § 21. *Morgan v. R. R. Co.*, 6 Otto 716; *Hunter v. Middleton*, 13 Ill. 50; and such estate may be created by the mere filing of the plat, without any deed to the public or its representatives, *Morgan v. R. R.*, *supra*.

May be Created without the Use of Technical Words.

While the qualification must be found in the deed itself, still no special or technical words are necessary to annex a qualification to a grant of the fee, so as to impress upon it a base character. In determining whether a given limitation constitutes a base fee or not, the questions by the answers to which the character of the estate is to be settled are, did the grantor intend to give a base fee? and, does such intent appear in the deed? And the question of intent is to be answered by a consideration of the whole instrument by which the estate is created. The rule as stated by Kent is that the construction of a deed "will, after all, depend less upon artificial rules than upon the application of good sense and sound equity," 4 Kent Com. 132; and this principle is recognized in *Adams County v. Logan*, 11 Ill. 336, wherein CATON, J., said: "Had the deed on its face contained a reservation, or had any specific purpose for which the land was conveyed been declared from which a reservation might be implied, then we should have something upon which we could act, and we might, possibly, so far disregard the literal expressions of the conveyance as to give effect to the spirit and intent of the transaction." See also *Police Jury v. Reeves*, 6 Mart. (N. S.) 221.

Construction of Deed alleged to Create a Base Fee.

In construing a deed which, it is claimed, creates a base fee, the rule that wherever a clause can be construed as making either a covenant or a

condition or a limitation, that construction which will make a covenant is to be preferred, *Wheeler v. Dascomb*, 3 Cush. 285; *Blanchard v. Detroit, Lansing and Lake Michigan Railroad Co.*, 31 Mich. 43, will apply. See *First Methodist Episcopal Church v. Old Columbia Public Ground Company*, 14 W. N. C. 229; and, as we have seen, a mere declaration in the deed or devise that the grant is made for a special and particular purpose will not, of and by itself, create a condition (*ante*, Volume I., p. 125), so the mere expression of purpose will not create a base fee, although it seems that where the expression of the purpose is such as to show that the intention in the grant was rigorously to confine the use of the premises to a certain purpose, or at least to insure that the said purpose should be carried out with reference to or by the instrumentality of the land granted, so long as the land was out of the possession of the grantor, there a base fee will be held to be created. See *Bolling v. Mayor, etc., of Petersburg*, 8 Leigh 224. An example of this is found where, after mentioning the purpose, either in the habendum or elsewhere in the deed, the grantor subjoins the words, "and for no other purpose whatsoever." *Kirk v. King*, 3 Pa. St. 436; *Scheetz v. Fitzwater*, 5 Id. 126. A mere recitation of the purpose of the grant, taken in connection with the circumstances of the case, may establish the estate granted as a base fee. See *Board of Education of Van Wert v. Edson*, 18 Oh. St. 221. Where the grant is in form limited to the time during which the property is put to a specified use, the estate granted will be a base fee, as where the grant was "as long as used for a canal," *State v. Brown*, 3 Dutch. 13; or "so long as they use it for that purpose, and no longer," *Henderson v. Hunter*, 59 Pa. St. 335.

The presence in a deed or devise of a clause providing for a reëntry on the occurrence of a certain event, or the cessation of a recognized order of affairs, will generally show that the estate granted is one on condition subsequent, and not a base fee; for, as we have seen, the distinguishing characteristic of an estate on condition subsequent is the existence in the grantor of a right of reëntry for condition broken. *Attorney-General v. Merrimack Manufacturing Co.*, 14 Gray 612.

Base Fee Created where Possession is taken under Articles of Sale.

A question may sometimes arise as to the character of the estate of the vendee, where there are articles of agreement for sale, and in them a restricted use of the premises which are the subject of the sale is mentioned as the purpose for which they are to be conveyed, and without any further deed the vendee enters upon the land. *Hill v. Western Vermont R. R. Co.*,

32 Vt. 68, is a case involving this question, and it was there held that the estate taken by the vendee was such an estate as was contemplated by the parties to the articles of agreement, viz., an estate limited to the particular use, and it was further held that this limitation could be found in the character of the vendee, as where a conveyance is made to a corporation authorized to take land for railroad purposes or canal purposes. REDFIELD, C. J., said: "A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed." A very interesting case upon the same subject, *The Heirs of Daniel v. Richmond and Alleghany R. R. Co.*, is now pending in the courts of Virginia.

Base Fee a Fee-Simple notwithstanding its Determinable Quality.

The estate in the hands of the grantee is a fee-simple, and the owner has, during its continuance, all the rights of a tenant in fee-simple, notwithstanding the qualification attached to his estate, as said by GREEN, C. J., in *State v. Brown*, 3 Dutch. 13, "by the terms of the conveyance the grantees take a qualified fee liable to be defeated whenever they cease to use the land for the purpose specified in the grant. 1 Inst. 1 b, 27 a; 1 Cruise 79, Tit. 1, § 82; 2 Bl. Com. 110. Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same right and privilege over his estate as if it were a fee-simple. Plowd. 857; 1 Cr. 5 a, Tit. 1, § 86."

The estate as a fee-simple may endure forever, and a remainder cannot be created thereon, *Church in Brattle Square v. Grant*, *supra*, Vol. I., p. 175, 4 Kent Com. 10.

Base Fee, if Conveyed by Grantee, is Subject to the Qualification in the Hands of the Subsequent Grantee.

The grantee may freely convey his estate, but the qualification attached thereto will follow it in the hands of his grantee, and through any transmutations of the estate, as said by Kent: "If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that, *nemo potest plus juris in alium transferre quam ipse habet.*" 4 Kent Com. 10. It follows that there is no way by which the owner of a base fee can by his own act rid it of its determinable quality; see Preston's Watkins on Conveyancing, p. 79.

Descent of Base Fee.

The descent of a base fee is governed by the same rules as those which control the descent of an absolute fee. 1 Prest. Est. 445.

After Conveyance of Base Fee, the Grantor retains only a possibility of Reverter.

When the grantor has created a base fee, his estate is entirely gone from him; 4 Kent Com. 10; *Church in Brattle Square v. Grant*, *supra*; he has in him no reversion, *Id.*, and no right which will in any way give him any control of or right to interfere with the land granted. As said by TREAT, C. J., in *Hunter v. Middleton*, 13 Ill. 50: "The title may perhaps revert to the former owner on the destruction of the corporation or on the abandonment of the ground for the purposes of streets or alleys. But until the estate is thus defeated the fee is as completely out of him as if he had made an absolute and unconditional conveyance. Having neither the legal title nor the exclusive right of possession he cannot bring trespass for any injury to the soil or freehold. He has no title to be assailed, no possession to be invaded. A party who conveys away a tract of land in trust cannot maintain trespass or ejectment for any injury thereto until the purposes of the trust are accomplished and the title has reverted. And this case is not different in principle."

All that remains in the grantor is the mere possibility of reverter; 4 Kent Com. 10; Jarman on Wills, 792; *Church in Brattle Square v. Grant*, *supra*, Vol. I., at p. 175; 2 Minor's Inst. 365. Shepherd's Touchstone, however, speaks of a reversion remaining in the grantor which may be granted, p. 132, and though the word reversion may have been carelessly used, yet there is the authority of a decided case for the position that the right of the grantor, even if only a possibility, may be granted. See *Scheetz v. Fitzwater*, 5 Pa. St. 126.

On Cessation of Base Fee, Reëntry not necessary to Revest Estate in Grantor:—When Estate has Expired, how Determined.

When the base fee ceases by limitation, there is no necessity of reëntry to revest the estate in the grantor. See *ante*, p. 19. And where the limitation has reference to the use of the land granted, the question becomes of interest, when does the estate expire by its limitation? This, it is thought, must, ordinarily, be determined by the rules of reason and common sense; and where there is nonuser for such a time, or such dealing with the premises granted as would demonstrate that the use of the land for the purposes for which it was granted has been abandoned, the estate

will be held to be at end; thus in *Kirk v. King*, 3 Pa. St. 436, a discontinuance of a school for seven years was held sufficient evidence of abandonment of the use for school purposes of land granted therefor, and in *Scheetz v. Fitzwater*, 5 Id. 126, ploughing and sowing the site of a mill-dam or pond were held to have the same effect with regard to land granted for a mill-dam.

The question has also arisen whether, where the estate is given for a certain use and another use is made of the premises, although the purposed use is kept up also, the grantor can claim the estate under his right of reverter? The answer seems to be that, unless by the grant the use is, by words excluding any other use, restricted to the purpose recited, the base fee will not be held to have expired through the application of the premises to other uses, provided they do not destroy or interfere with the use for which the estate was granted. Thus in *Bolling v. The Mayor, etc., of Petersburg*, 8 Leigh 224, the grantor made a deed of land to the use of a town "for purposes hereinafter mentioned," with a covenant for quiet possession, so long as the judicial proceedings should continue to be held thereon. "Provided, that in case the judicial proceedings shall cease to be held thereon, and shall be removed and held permanently at some other place," the land should "reinvest in the said Robert Bolling." The town authorities, without interrupting the use of the land for the purposes granted, erected buildings thereon and rented them out. The plaintiff claimed that by such use the limitation was determined. But the Court held otherwise. BROCKENBAUGH, J., said: "Here, then, is a conveyance in fee for the use of the town for the purpose of having the court-house and jail on the lot conveyed, and that the judicial proceedings may be permanently held there; with a covenant for quiet enjoyment so long as the judicial proceedings are held there, and with only one condition annexed, which is that whenever the judicial proceedings cease to be held there, and are permanently held at some other place, then the lot shall reinvest in the grantor or his heirs. The terms of the conveyance have been complied with; the court-house and jail are on the lot, and the judicial proceedings are still held there; the condition is not broken and the reinvestiture cannot take place. But the complaint is that the appellees have applied a portion of the ground to objects inconsistent with the grant; that they have laid it off in building lots, which they have let out to individuals, on long leases, and have thereby acquired considerable profit to the corporation not intended by the grant. This complaint is, I think, entirely without foundation. There appears to be abundance of room on the acre of land for the new tenements and for the court-house and jail. The judicial proceedings are carried on there with perfect convenience, and the buildings

erected do not interfere with the full enjoyment of the rights vested in the people of the town by the grant. They do not complain that they are restricted in the full exercise of their rights. Whilst the condition on which the corporation hold the lot is not broken, they hold complete dominion over it, and may use it in any way that they think best for the use of the town." TUCKER, P., said: "Had it been his [the grantor's] design to exclude any other use, a single phrase would have effected his purpose. He had but to add 'and for no other use whatsoever.' But he has not done so. For aught that we can see, the advantage he looked to was the continuance of the public buildings on that spot, which would enhance the value of his property in the vicinity. There is nothing to show that either party, at that time, thought of the possible future erection of other buildings, and if they did not the future restriction could not have been intended. To consider it as part of the bargain now would be to make a contract for the parties instead of construing one. To give to the *affirmative* stipulation that the Mayor, etc., should continue the court-house on the lot, the effect of a stipulation that they would erect no other buildings would be to bind them to what they did not dream of. With what propriety or justice can we say that the Mayor, etc., did understand, or ought to have understood, a covenant to erect and continue the court-house there as a covenant that they would erect no other building there? Various other buildings might be and are usually found necessary on the public square of a corporation. A clerk's office is neither mentioned in the law nor in this deed. Is it then inhibited to erect one? . . . I am therefore of opinion that this affirmative provision is not to be construed *negatively*, even if the language was what it has been supposed." And CABELL, J., said: "In such a purchase, the purpose to which the land is to be applied cannot justly be regarded as excluding other purposes not essentially inconsistent with that which is expressed. If it be the object of the grantor to restrict the use to the purpose declared, he should introduce covenants and stipulations excluding by express declaration or necessary legal inference all other application." And see *Broadway v. State*, 8 Blackf. 290.

When the Object of Limitation becomes Impossible, the Estate will Revert.

When the object of the limitation becomes impossible the land granted will revert, and this applies in cases of dedication to public use. *Leclercq v. Trustees of Gallipolis*, 7 Oh. 218; *Board of Education v. Edson*, 18 Oh. St. 221.

Estate becomes Absolute when Event limiting it as to Time becomes Impossible.

When the estate is dependent upon a collateral event which is marked out, by the instrument creating it, as the boundary of the time of the continuance of the estate and such event becomes impossible, the estate will become an absolute fee, *Friedman v. Steiner*, 107 Ill. 125.*

*The writer desires to acknowledge the assistance he has received in the preparation of the foregoing note from a brief of the Hon. John W. Daniel, of the Lynchburg (Va.) Bar, kindly given to him by that gentleman.

Estates for Years.

HORNER v. DEN EX DEM. LEEDS.

Supreme Court of New Jersey, June Term, 1855.

[Reported in 1 Dutcher 106.]

1. Instrument held to be a lease, and not a conveyance in fee. Where the intention of the parties can be gathered from the whole instrument that intention must govern the construction.
2. The duration of a term, if not definitely expressed in a lease, may be fixed by reference to collateral or extrinsic circumstances.
3. Where a lease is for a term determinable upon the abandonment of the manufacture of salt by the lessees, and they do abandon the manufacture, the abandonment being their own act, they are not entitled to notice to quit.
4. A tenant is not permitted, in an action of ejectment brought against him, to deny the title of him under whom he claims.
5. He may show that the landlord has sold his interest in the premises; but the testimony of a witness that the landlord told him, the witness, so, is not competent to prove such sale.

THIS was an action of ejectment, brought by Robert B. Leeds against John Horner, to recover possession of a tract of land on Absecom beach, in the county of Atlantic. The case was tried before Justice Elmer, in the Atlantic Circuit, at the April term, 1854, and a verdict and judgment rendered for the plaintiff. A writ of error was brought by the defendant, removing the case into this Court.

The plaintiff below claimed title through Jeremiah Leeds, and, on the trial, proved his title by several surveys and deeds of conveyance running back to the year 1695.

He also proved possession, by himself and those under whom he claimed, since the year 1783.

The counsel for the defendant offered to prove, by one James Baker, that since the commencement of this suit, witness went to said Robert B. Leeds, for the purpose of purchasing the whole or a part of the property in controversy, and said Leeds told witness that he would not sell it to him, for he had already sold it to William Moore, which evidence was overruled.

The counsel for the defendant then, after examining several witnesses, gave in evidence a certified copy of an instrument under seal, dated April 1, 1816, executed by Jeremiah Leeds to John Blake, and acknowledged and recorded in the county of Gloucester.

It also appeared in evidence that, on the 12th of April, 1816, Blake assigned his lease to the Absecom Salt Manufacturing Company, and by an agreement made with the company, dated April 30, 1816, became manager of the works; and the dwelling-house to be built was leased to him, from year to year, until 1847.

Under an agreement, made March 20, 1847, the defendant, Horner, got possession, and became manager of the works. The manufacture of salt was continued to the close of the year 1849, when it was abandoned, and has not since been recommenced.

The defendant, John Horner, claimed title, under the lease from Jeremiah Leeds to Blake, to six acres of the tract in dispute, and the main question in the case, and upon which it turned, was the construction of this lease.

The plaintiff below insisted that it was a lease of land for a particular purpose, and determinable without notice when the land ceased to be used for the purpose intended.

The defendant, Horner, contended that it was a conveyance in fee.

The case was argued before the CHIEF JUSTICE and Justices OGDEN and PORTS, by *W. Halsted*, for plaintiff in error, and by *Woodhull* and *Browning*, for defendant.

Halsted, for plaintiff in error.

The material question in this case is, whether lease is of such a nature as to authorize plaintiff to sue without notice to quit.

Lease is ambiguous, and should be construed most strongly against grantor.

If it can be construed as a grant, it should be. *Heyward's case*, 2 Coke 35; 4 Bac. Ab. 520, G.; *Ibid.* 526, I.

Instrument says "grant;" he grants messuage and the privilege of erecting house on beach.

The grant is for any term Blake may think proper, for consideration of \$100, to be laid out in salt works and to be considered two shares of \$50 each, the two shares to belong to grantor.

This is followed by warrantee to heirs and assigns. It is a grant for an indeterminate term of years; does not possess the characteristics of a lease.

Lease is for a determinate period, with the recompense of rent. 14 Pet. 526-8, *U. States v. Gratiot*.

Rent must be reserved out of land or profits of land.

No *reddendum* clause in instrument. 2 Black. Com. 41; 2 Thomas' Coke 439; Woodf. Land. & Ten. 9 and 11.

When land granted at pleasure of either party, old cases held that either party might determine it at pleasure. Modern cases hold that it cannot be determined by lessor. 3 Bos. & Pul.; 7 Vesey 231; 9 East 15; 5 Bac. Ab. Lease L.

Here is power for lessee to determine it. 4 Bac. Ab. Lease L. 3; *Say v. Smith*, 1 Plowd. 272.

The end must appear by terms of lease.

If a lease, there must be notice. *Den v. Drake*, 2 Green 523.

We offered to prove that lessor of plaintiff had said he had sold this land to Moore. Plaintiff must have title. 5 Texas R. 582; 2 Stark. Ev. 22, 3, and 6; Halst. Dig. 429, § 23.

Woodhull, contra.

The main question clearly is on construction of lease from Jeremiah Leeds to Blake.

It should be interpreted according to intent of parties.

The demising clause is in appropriate terms, "demise, grant, and to farm let." 2 Bl. Com. 317.

The consideration was to be laid out in salt works. The whole consideration arises out of erection of works; if not erected, or if work ceased, consideration failed.

Construction of instrument should be reasonable. 2 Bl. Com. 379.

The rule, that instrument is to be taken most strongly against grantor, is not to be resorted to till all others fail.

If the lease was determinable on certain contingency, no notice was necessary. 1 Saund. Pl. & Ev. 465 and 6; 7 Halst. 99, *Den v. Adams*.

Parol evidence of sale does not show change of title.

Browning, same side.

If this be a lease determinable on happening of certain event, the

happening of that event *ipso facto* determines tenancy. Comyn, Land and Ten. 183, 286, (6 Law L.)

Instrument however untechnical, the intention is to prevail.

It is a lease or grant of privileges on land. It contemplates establishment of company, and Leeds to become a member.

Instrument was always called and treated as a lease by all parties, from first to last.

Warranty to heirs cannot enlarge the grant. 3 Iredell 379, *Den v. Young*; 3 Watts & Serg. 162, *Moss v. Sheldon*.

The *habendum* cannot alter estate. 2 Bl. Com. 298; 2 Co. Rep. 23; 8 Ibid. 56.

The demise is for a term of years. This expression is never found in a grant in fee.

The property was leased for a particular purpose, to be used for the manufacture of salt, with certain other privileges.

The rent depended on the manufacture of salt; the moment manufacturing ceased the rent ceased.

The lessor never gave up possession further than was necessary to the exercise of the privileges granted; he had the right to use it for all purposes not inconsistent with the grant.

The time was limited by the purpose of grant; it was for so long as grantee might choose to exercise the privileges.

Like the grant of a fishery, the proprietor retaining all control of the land, except so far as necessary to fish.

Defendant had no claim to notice to quit.

Halsted, in reply.

The paper is certainly not a lease. 2 Greenl. Cruise, Vol. 4, tit. 32, ch. 5, § 1.

"Demise, lease, and to farm let" are appropriate words of lease.

Rule of law is intention of parties, as declared by instrument, must govern construction. *Poole v. Bently*, 12 East 168.

If the grantee does not determine the estate, it is tantamount to a fee.

The case of *Moss v. Sheldon*, 3 Watts & Serg. 162, cited by counsel, is directly against him.

The *habendum* may enlarge the estate given. Thomas Jones' R. 4, *Pillsworth v. Pyatt*.

Language of instrument is peculiar: the grantee is to hold property

as long as he thinks proper. Cannot interpolate "as long," etc., "as salt works are carried on."

It is eminently just that in this case notice to quit should be required.


POTTS, J.—This was an action of ejectment, brought to recover possession of a tract of land on Absecum beach, in the county of Atlantic. The defendant below, John Horner, to maintain his title to six acres of the tract which he claimed, gave in evidence a certain instrument under seal, executed and acknowledged by Jeremiah Leeds, in the words following :

"This indenture, made the first day of April, eighteen hundred and sixteen, between Jeremiah Leeds, of the one part, and John Blake, of the other part, witnesses that the said Jeremiah Leeds doth demise, grant, and to farm let, unto the said John Blake, his executors, administrators, and assigns, all that messuage and privilege of erecting a salt works on N. E. end of Absecum beach, with the privilege of setting a dwelling-house thereon; also the privilege of pasture for two cows, with what team the works may want, situate, lying, and being in the township of Eggharbor, in the county of Gloucester, and State of New Jersey, with all and singular the appurtenances thereunto belonging, for any term of years the said John Blake may think proper from the above date, for the consideration of the sum of one hundred dollars, to be laid out by the said Blake, or his assigns, in the aforesaid salt works, for the use of the said Jeremiah Leeds, which is to be considered as two shares in said works, that is to say fifty dollars per share, it being part of my plantation whereon I now dwell, will warrant and for ever defend, at any term or terms of years, unto the said John Blake, his heirs, executors, administrators, or assigns, or any of them, to have and to hold the said privileges unto said John Blake; his heirs and assigns shall hold and enjoy the said premises without the lawful let or eviction of him, the said Jeremiah Leeds, his heirs, executors, administrators, or assigns, or any of them, or any person or persons lawfully claiming by, from, or under them, or any of them, or of the lawful claim of any person or persons whatsoever, freed and indemnified against all former claims and encumbrances whatsoever, made and committed, or to be made, committed, done, or suffered by the said Jeremiah Leeds, his heirs, or any person or persons having or lawfully claim or to claim, by, from, or under him, them, or any of them.—In witness whereof, the said Jere-

miah Leeds has to these presents set his hand and seal, the day and year first above written.

JEREMIAH LEEDS, [L. s.]

Sealed and delivered in the presence of John Daniel.

Her
RACHEL  STEELMAN."
Mark.

The plaintiff claimed title through Jeremiah Leeds, and the defendant through Blake: and the principal questions argued by counsel here were—

1. Whether this instrument was a lease or a conveyance in fee of the land.

2. If a lease, when and how it was determinable; and—

3. Whether it created such a tenure as required a legal notice to quit before ejectment could be maintained.

The Court charged the jury that it was a lease; that the term expired when the lessees abandoned the manufacture of salt; and that, as such abandonment was their own act, no notice to quit was necessary.

To this instruction of the Court the defendant excepted.

The verdict was for the plaintiff below.

The instrument, as will be perceived, is very inartificially drawn, contains a good deal of ambiguous phraseology, and was very well characterized at the circuit as "a badly drawn paper." But still I think its meaning can be ascertained with reasonable certainty.

It is a demise of a messuage on the northeast end of Absecum beach, for the purpose, I take it, of erecting salt works thereon, to John Blake, his executors, administrators, and assigns; and with the privilege of erecting a dwelling-house thereon, and pasturage for two cows and such teams as may be required in carrying on the proposed salt works. The words used are "demise, grant, and to farm let," and these are the usual terms by which a lease is made according to the English precedents. Comyn, Land. and Ten., 6 Law Lib. 34; Woodfall, Land. and Ten. 4; though the word grant is not commonly used in our forms of conveyancing when a term of years only is meant to be conveyed. Oliver, in his work on conveyancing, 290, adopts the words "demise, lease, and to farm let;" and in 2 Graydon's Forms, 41, 43, we have both "demise, set, and to farm let," and "demise, lease, and to farm let." It is well settled, however, that the words give, grant, lease, or set are equally

proper, and have come to be used indiscriminately in instruments of this character.

The time for which the premises are demised is expressed to be "for any term of years the said Blake may think proper from the above date." This is certainly an unusual limitation of a term. Literally taken, it means that the demise is for a term of years only, but that that term is to run during Blake's pleasure—as long as he thinks proper. If, however, we can gather from the whole instrument the intention of the parties, that intention must govern. Now the object had in view by the parties at the time was the erection of salt works, and the carrying on of the business of manufacturing salt on the premises. Except in the use of the technical words demise, grant, and to farm let, there is nothing in the language of the instrument which indicates an intention that the premises should be used for any other purpose than that of erecting, maintaining, and carrying on the work and business of manufacturing salt, and such other uses as were necessary and incidental to such a business. It is the "privilege" of erecting salt works, the "privilege" of setting a dwelling-house on the premises, and the "privilege" of pasturing two cows, with what teams the works may want. The *habendum* is to have and to hold the said "privileges;" and the instrument gives no description of the premises by metes, bounds, or quantity, though there is a description appended to it by way of note or memorandum. Doubtless the demise is of the land, with the privileges; but we are looking for the general intent of the parties.

Then again, when we look for the consideration of the grant, we find that it is an interest in the salt works. As the instrument expresses it, the demise is "for the consideration of the sum of \$100, to be laid out by the said Blake, or his assigns, in the aforesaid salt works, for the use of the said Jeremiah Leeds, which is to be considered as two shares in said works, that is to say \$50 per share." The return for the land, therefore, was in substance the dividends of two shares, a portion of the profits of the contemplated business of manufacturing salt.

Was it the intention, the understanding of the parties, that Blake was to have the land, and refuse to erect the works, or carry on the business of manufacturing salt? or hold it longer than he continued the business out of the profits of which the rent was to come? It is like a lease of a fishery for the annual render of a certain share of the

fish caught, or a mine for a share of the ore excavated, or a mill site for a share of the profits of a mill to be erected by the tenant. Could the tenant hold the premises and refuse to fish the fishery, or work the mine, or erect the mill, and carry on the business, even though the lease was for such term as the tenant might think proper? I think not.

But it is insisted that the *habendum* in this instrument is to Blake and his heirs, and that this must govern the construction, because it is the office of the *habendum* to determine the quantity of the estate granted. Unfortunately, however, for the argument, it is far from being clear that the *habendum* is to the heirs. The words are, "to have and to hold the said privileges unto said John Blake; his heirs and assigns shall hold and enjoy the said premises without the lawful let or eviction of him, the said Jeremiah Leeds," etc., etc. All the words following the name John Blake belong to the covenants rather than to the *habendum* clause.

The duration of a term, if not definitely expressed in a lease, may be fixed by reference to collateral or extrinsic circumstances. Comyns L. and T., 6 Law Lib. 50. And it was in evidence in this case that a company was organized for the manufacture of salt on the premises immediately after the date of the instrument in question; and that Blake, for a small consideration, forthwith assigned all his right to the premises to this company for the purpose of a salt works, and for as long as the company might choose, reciting this instrument in his said assignment as a lease from Leeds.

Upon the whole, I am of opinion that this instrument must be taken to be a lease for so long a term as the lessees should use the premises for the purpose of manufacturing salt, and no longer; that such was the intention of the parties, as is fairly deducible from the whole instrument; that it is the only reasonable construction which can be given to it; and that it is a construction in accordance with the subsequent conduct of the parties and their successors, etc.

If this is so, the lease was for a term determinable upon the happening of a certain event, to wit, the abandonment of the manufacture of salt by the lessees: and as that abandonment was their own act, they were not entitled to notice to quit. Comyn 285; 6 Law Lib. 160; *Right v. Darby*, 1 Durn. & East 162; *Den v. Adams*, 7 Halst. 101.

There was, therefore, no error in the charge of the Court.

Two other exceptions were taken in the course of the trial. The first

was to the admission of certain deeds in evidence, forming part of the plaintiff's chain of title. These deeds are not before the Court, nor does the ground of objection to them appear; but inasmuch as the defendant subsequently set up the above mentioned lease from Leeds, he precluded himself from taking advantage of any defect of this sort, for a tenant is not permitted to deny the title of him under whom he claims.

The second exception was to the ruling of the Court, refusing to admit evidence, offered by the defendant, of an alleged declaration of the lessor of the plaintiff, that he had sold the premises. It is true that a tenant may show, in an action of ejectment by the landlord, that the landlord's title has expired, or that he has sold his interest in the premises. 2 Greenl. Ev. § 305.

But I am not aware that it has ever been held that this may be shown by merely producing a witness to swear that the lessor of the plaintiff told him he had sold. To let in loose evidence of this description might work serious mischief.

The judgment below should be affirmed.

CHIEF-JUSTICE and OGDEN, J., concurred.

It is purposed in this note to examine some of the main characteristics of the estate for years, and in so doing, while it will become necessary to speak of some of the rights which exist as between landlord and tenant, yet the law of landlord and tenant in its fulness, and considered as such, is by no means within the scope of this note.

Estate for Years. Definition.

An estate for years is defined by Littleton to be "where a man letteth lands or tenements to another for term of certain years after the number of years that is accorded between the lessor and lessee." Co. Litt., Sec. 58, 43 b. Blackstone's definition is as follows: "A contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years agreed upon between the lessor and the lessee, and the lessee enters thereon." 2 Blackst. Com. 140. It will, however, readily be seen that an estate for years may be created otherwise, as by a devise of land

for a certain determinate time, or, as in the example put by Chitty in his note to the above quoted definition of Blackstone, by a devise to executors for the payment of the decedent's debts, in which case the executors will not take an estate of freehold but an estate for so many years as may be necessary to raise the sum required. *Carter v. Barnardiston*, 1 P. Wms. 509; *Hitchens v. Hitchens*, 2 Vern. 404, 2 Freem. 242; *Doe v. Simpson*, 5 East 171; *Doe v. Nicholls*, 1 Barn. & Cresw. 342.

Estate for Years embraces Estate for Definite Period even if for One Year only or less.

The term, estate for years, will embrace estates for a single year or even for a less period, as said by Littleton, "if tenements be let to a man for a term of half a year or for a quarter of a year, etc., in this case if the lessee commit waste the lessor shall have a suit of waste against him and the suit shall say *Quod tenet ad terminum annorum*," Litt., Sec. 67; for the distinguishing characteristic of the estate for years is its certainty or, rather, definiteness as to time, and based on this characteristic we find an admirable description of the scope of the estate for years given in *Rothschild v. Williamson*, 83 Ind. 387, as follows: "Estates for years embrace such as are for a definite period, for a single year, or for a period still less if definite and ascertained, as a term for a fixed number of weeks or months as well as for any definite number of years however great." And see *Brown's Adm'r v. Bragg*, 22 Ind. 122.

Origin of Estates for Years.

According to Blackstone, the origin of estates for years is to be found in grants to farmers or husbandmen who occupied the land of others, and every year rendered, for the use of the land, some equivalent in money or rent in kind, and to whom, to encourage them in good husbandry, was granted in the land they tilled, a permanent, fixed interest not determinable at the will of the lord of the soil. 2 Blackst. Com. 141.

The estate for years is not a freehold interest, but a chattel, 2 Blackst. Com. 142, even if it be for a period far longer than any possible life, for the duration of the term is immaterial provided it be fixed and determinate, and there be either a remainder or reversion in another person. Co. Litt. 46 a. *Flannery v. Rohrmayer*, 49 Conn. 27; thus in *Goodwin v. Goodwin*, 33 Conn. 314, an estate for nine hundred and ninety-nine years was held personal property, and in *Brewster v. Hill*, 1 N.H. 350, it was held that a term of nine hundred and eighty-five years would pass by a will under the

name of personal estate; and even if the lease is by the terms of its creation renewable forever, *Murdock v. Ratcliff*, 7 Ohio 119, *Allender v. Sussan*, 33 Md. 11, or if it contain a privilege to purchase, *Hazard Powder Co. v. Toomis et al.*, 2 Disney 544, the estate is still but a chattel.

Attribution of Freehold Qualities by Statute.

In some States by statute some of the qualities of a freehold estate have been conferred on estates for years of great length. In Massachusetts a term for one hundred years or more—so long as fifty years thereof remain unexpired—is regarded as an estate in fee-simple as to everything concerning its descent, devise, dower therein, and its sale by executors, administrators, guardians, or trustees. And the holder of an estate of such length, while fifty years thereof remain unexpired, is regarded as a freeholder. Pub. Stat. (1882), Ch. 121, § 1, p. 735. In Ohio a term of ninety-nine years is held a fee-simple so far as regards the law of descent, *Abbott v. Bosworth*, 36 Oh. St. 605. But even a perpetual leasehold does not rise to the dignity of a fee-simple although it is treated for many purposes as such. *Taylor v. De Bus*, 31 Oh. St. 468; *Smith v. Harrison*, 18 Reporter 504.

In Maryland a vendor's lien has been sustained where its subject was an estate for ninety-nine years, renewable forever. *Bratt v. Bratt's Adm'r*, 21 Md. 578. But the estate for years even of such great length descends as personalty and goes to the executor as assets, and not to the heir, and is distributable as personalty by the authority of the Orphans' Court. Code, Art. 93, § 220; *Williams v. Holmes*, 9 Md. 281. And an executory bequest of such a term will be held subject to the rules governing a bequest of personalty. *Allender v. Sussan*, 33 Md. 11.

In Georgia an estate for years passes as realty, and the tenant has the same right over it as if it were a greater estate, provided he do not injure him in reversion or remainder. Code (1882), §§ 2273, 2275; *Clark v. Herring*, 43 Ga. 226.

Creation of Estate for Years. Lease. Rent not necessary to constitute Lease.

The estate for years being but a chattel, no livery of seizin is or ever was necessary for its creation. St. German, Doct. & Stud., Dial. I., ch. 7. *Field v. Howell*, 6 Ga. 423; *Edwards v. Perkins*, 7 Oreg. 149.

While an estate for years may be created in other ways, yet by far the most usual method of creation is by lease.

A lease for years has been defined as "a contract by which one agrees,

for a valuable consideration called rent, to let another have the occupation of and profit of land for a definite time." *Moring v. Ward*, 5 Jones Law 272. This definition, while it would correctly describe most leases for years, is not strictly accurate, for rent is not absolutely necessary to the existence of a lease, *Mitchell v. Commonwealth*, 37 Pa. St. 187; *Folden v. The State*, 13 Neb. 328; the tenant may have an estate for years without any render, and a seal upon the instrument creating it will import consideration. COULTER, J., in *Callen v. Hilty*, 14 Pa. St. 286, said "a lease is properly a conveyance of any lands or tenements in consideration of rent or other annual recompense, though doubtless a return or recompense in gross would be sufficient." A better definition is that given by Broom and Hadley, 1 Com. 506, viz.: "A conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years or at will, but always for a less time than the lessor has in the premises; for if it be for the whole interest it is more properly an assignment than a lease." While it is not absolutely necessary that rent should be provided for in order to make a lease, the presence or absence of a reservation of rent is, nevertheless, a very important factor in determining whether a given paper is or is not a lease, and, where no rent is reserved, in order to justify the construction of a paper as a lease, it must clearly appear that a lease was intended, for the presumption in such case is to the contrary. *State v. Page*, 1 Spear 408.

In Louisiana, Rent an Essential Part of a Lease.

In Louisiana, under the Code, a fixed rent is an essential part of a lease, and, therefore, in a case where no fixed rent was reserved by the instrument under consideration, which merely provided that a reasonable rent, to be settled by the award of three persons designated, should be paid, it was held that the instrument did not constitute a lease, for the lack of an essential part, *Haughery v. Lee*, 17 La. Ann. 22; but it has also been held that the amount of rent may be fixed by an extraneous circumstance, where a certain standard has been fixed by the lease itself; thus, in *Municipality No. 1 v. The General Council of New Orleans*, 5 La. Ann. 761, a paper which provided that the annual rent should be six per cent. of the cost of the premises demised was upheld as a good lease.

Distinction made in Georgia between Estate for Years and Demise of Possession and Enjoyment.

It may be noted that in Georgia a distinction is taken between an estate for years and a mere demise of the possession and enjoyment of the premises

of the lessor, whether for a fixed period or at the will of the lessor, and it is declared by the Code that in the latter case no estate passes out of the grantor, and that the grantee has the usufruct only. Code (1882), § 2279. See *Clark v. Herring*, 43 Ga. 226. It is not thought that this distinction obtains elsewhere.

What Words will Create a Lease.

The proper and technical words for the creation of a lease are demise, grant, to farm let, betake. Co. Litt., 43 b. *Horner v. Den ex d. Leeds*, 25 N. J. Law 106; *Steel v. Frick*, 56 Pa. St. 172. But it has long been held that no precise form of words is necessary to constitute a lease; as said by SERGEANT, J., in *Watson v. O'Hern*, 6 Watts 362, "It is an established rule of law that whatever words are sufficient to explain the intent of the parties, that the one should divest himself of the property and the other come into it for a determinate time, whether they run in the form of a license, covenant, or agreement, will, in construction of law, amount to a lease as effectually as if the most proper and pertinent words were made use of for that purpose." Any words, therefore, which show an intent to convey by their own operation the possession of certain specified land for a limited time will suffice to create a term of years. *Maverick v. Lewis*, 3 McCord 216; *Smith v. Simons*, 1 Root 318; *Mickie v. Lawrence*, 5 Rand. 371; *Moore v. Miller*, 8 Pa. St. 283; *Offerman v. Starr*, 2 Id. 394; *Greenough's Appeal*, 9 Id. 18; *Bussman v. Ganster*, 72 Pa. St. 285; *Moshier v. Reding*, 3 Fairf. 478. This doctrine has been very liberally applied. Thus, in *Colcord v. Hall*, 3 Head 625, a paper headed "Things I want done," and which, after specifying the desires of the lessor, continued as follows, "H. to hold possession until the 25th of December, 1859, and the said H. to have entire control of the premises as agent for A. E. Colcord" [the lessor], was held a good lease.

In *Kunkle v. The Philadelphia Rifle Club*, 10 Phila. 52, the paper to be construed was to the following effect: Kunkle should be permitted to occupy, for the use of himself and family, such rooms, of a certain building, as the club committee might designate, until March 31, 1876, in consideration of \$500 per annum, paid quarterly; he should have the privilege of doing certain things upon the premises; he should keep them in good order, and in default of his removal, "at the expiration of the term," the club should have the right to take possession of the said premises. The instrument also provided for the confession of judgment for Kunkle in an amicable action of ejectment. The Court held that the paper constituted a lease, and did not merely confer a personal license, and hence the

administratrix of Kunkle was held entitled to the possession of the premises after his death.

In *Austin v. Huntsville Coal and Mining Co.*, 72 Mo. 535, an instrument which purported to "lease and convey" all the coal in certain land for a term certain was held a mining lease, and not a conveyance of the coal; and in *Kemble Coal Co. v. Scott*, 90 Pa. St. 332, a grant, under seal, of the exclusive right to mine, dig, and carry away the iron ore from certain tracts for a period of twelve years, at a rent of fifty cents per ton, was held a present lease and not an executory contract. And see *Emmons v. Kiger*, 23 Ind. 483; *Eastman v. Perkins*, 111 Mass. 30; *Moring v. Ward*, 5 Jones Law 272; *Munson v. Wray*, 7 Blackf. 403; *Linsley v. Tibbals*, 40 Conn. 522; *Offerman v. Starr*, 2 Pa. St. 394.

Lease must be for Fixed Time. Time—How Determined.

A lease must be for a certain limited time, *Pleasants v. Claghorn*, 2 Miles 302; *Bussman v. Ganster*, 72 Pa. St. 285; *Gilmore v. Hamilton*, 83 Ind. 196; but its duration may be fixed by extraneous or collateral circumstances, *Batchelder v. Dean*, 16 N. H. 265, as where the term demised is until at a certain rent the lessee shall be compensated for certain outlays, *Id.*, or until the lessor shall sell the land, *Clark v. Rhoads*, 79 Ind. 842; or where the leasing is "for any term of years the lessee may think proper from the above date," *Horner v. Den ex d. Leeds*, 25 N. J. Law 106; but where the duration of the term is to be determined by matter *ex post facto*, that matter must occur in the lifetime of both the lessor and lessee, *Western Transportation Co. v. Lansing*, 49 N. Y. 499. Where the lease leaves it in doubt upon which of two dates the estate granted shall end, the election has been held to rest with the lessee, *Murrell v. Lion*, 30 La. Ann. 255. Though this is a case decided in Louisiana, it would nevertheless seem to be sustainable upon common law principles, as the words of demise being those of the grantor are to be taken most strongly against him. See *Commonwealth v. Sheriff*, 3 Brews. 537; *Dodson v. Hall*, 11 Heisk. 198.

A lease which does not state the day upon which the term is to begin, but does state the year and a certain length of time during which the estate is to last, has been held to give an estate for the time mentioned, running from the last day of the year named, *Huffman v. M' Daniel*, 1 Oreg. 259. Though the report in this case states the day upon which the lease was delivered, yet the Court seems to have taken no notice of that circumstance. It is thought, however, that the rule laid down in the foregoing case should be confined to cases in which there is no date upon the deed, and no evidence of delivery, and that the better rule is that where a defi-

nite term is mentioned in the lease, and no time is set for its beginning, the term will run from the date of the paper, *Keyes v. Dearborn*, 12 N. H. 52. In the case of a conflict between the different parts of a lease as to the date of expiration of the term, the granting clause should control; thus in *Folden v. State of Nebraska*, 13 Neb. 328, there was a lease dated December 6, 1881, and expressed to be for six months; the paper continued, "which term will end on the sixth day of May, 1882," the Court held that the term granted was for six months from the date of the lease, and hence would expire in June, 1882, MAXWELL, J., saying, "It was unnecessary to fix the date of the termination of the lease, but when the date thus fixed is clearly inconsistent with the granting clause in the lease, it must yield to it."

A lease which does not state its duration is held to be for one year, unless the subject of it is property which is generally rented for a shorter period. See *Bonsall v. McKay*, 1 Houst. 520. In Delaware, Code (1874), Ch. 120, § 2, p. 707, and California, Code, § 6943, p. 777, it is enacted by statute that where no limit is fixed in the lease the term of one year shall be presumed; in Louisiana, under the Code, such a lease constitutes a letting from month to month, *Paquetel v. Gauche*, 17 La. Ann. 63.

Lease in Excess of Powers of Lessor.

Where the powers of a lessor to lease are limited by law, and the lessor attempts to give a lease for a greater time than he, legally, can, the lease will be held good for the time for which the lessor could lawfully make a lease. Thus in the *Town of Lemington v. Stevens*, 48 Vt. 38, the power of the selectmen with reference to leases was limited to the granting of leases for terms not exceeding five years. The selectmen made a lease to endure "as long as wood grows and water runs, or as long as we the selectmen have a right to lease the same." This lease was held a good lease for five years.

Length of Time for which an Estate for Years may be made. Statutory and Constitutional Restrictions in certain States.

According to Lord Coke, by the ancient law of England a lease could not be made for more than forty years for the reason that by long leases many were prejudiced and many times men were disinherited, Co. Litt. 45 b, 46 a; but by Coke's time the old rule had become antiquated, *Id.*; and according to Mr. Hargrave, who cites Maddox, *Formulare Anglicanum*, it must have become antiquated very soon, as leases for a longer time than

forty years may be found bearing dates as early as the reign of Richard II. The common law then may be stated to be that at the present day a lease may be made for any length of time which seems good to the lessor and lessee.

In certain States of the Union considerations of public policy have led to limitations, by positive enactment, upon the time for which lands may be granted. In some States the restriction applies only to lands of a certain character; in others, to lands generally without reference either to their character or the purpose for which they are demised.

In New York, the Constitution, Art. 1, § 14, forbids the making of a lease of agricultural lands, in which any rent or service is reserved, for a term greater than twelve years, and a lease made in contravention of this prohibition will not be construed as a lease valid for twelve years, but will be void *in toto*, *Clark v. Barnes*, 76 N. Y. 301; even if the letting be not for agricultural purposes, *Odell v. Durant*, 62 Id. 524.

This constitutional provision has, however, been held not to apply to a lease for life or lives, where the contract is a letting on shares, the Court basing the exemption of such contracts on the peculiar phraseology of the section: "No lease or grant of agricultural land for a longer time than twelve years, hereafter made, in which *shall be reserved any rent or service of any kind*, shall be valid," and regarding the share of the landowner as neither a rent nor a service. *Parsell v. Stryker*, 41 N. Y. (Hand) 480.

In California a lease of agricultural lands is limited to ten years, Civil Code, § 5717, p. 680; and a lease of city lots to twenty years, Id., § 5718, p. 680.

In Iowa, a lease of agricultural lands is limited to twenty years. Constitution, Art. I., § 24.

In Alabama, no lease for more than twenty years is valid, without regard to the character of the land leased. Code (1876), § 2190 p. 573.

Lease may be of Term to begin in futuro.

A lease may be made of a term to begin *in futuro*. *Field v. Howell*, 6 Ga. 423; *Whitney v. Allaire*, 1 Comst. 305; *Mechanics & Traders Fire Insurance Co. v. Scott*, 2 Hilt. 550; *Batchelder v. Dean*, 16 N. H. 265; *Trull v. Granger*, 8 N. Y. 115; *Bacon v. Bowdoin*, 22 Pick. 401; *Fox v. Corey*, 41 Me. 81; *Young v. Dake*, 5 N. Y. 643.

Lease takes Effect from Delivery.

A lease as such takes effect upon its delivery, which is necessary as in the case of other deeds, *Kelsey v. Tourtelotte*, 59 Pa. St. 184; and while

the day of delivery is presumably that of the date of the lease, it may be shown to be different. *Trustees of Green v. Robinson*, Wright (Ohio) 436; *McIntyre v. Strong*, 48 N. Y. Sup. Ct. (J. & S.) 127. When delivered, the lease passes a present interest. *Croswell v. Van Buren*, 7 Barb. 191.

Owner of Title, out of Possession, may make Lease, but must have Right of Possession at the Time the Lease is to take Effect.

A valid lease may be made by the owner of land, although he is not in possession thereof, *Kinsman v. Green*, 16 Me. 60; *Russell v. Doty*, 4 Cow. 576; *Rood v. Willard*, Brayt. 67; but the lessor must have the title to the premises at the time of the execution of the lease, *Trustees of Greene v. Robinson*, Wr. (Ohio) 436; *Hall v. Benner*, 1 P. & W. 402; and must also have the right of possession at the time that the lease is to take effect, thus where, after a levy and before a sale, a judgment debtor made a lease of the land levied upon, the lease was held to be overreached by the subsequent sale, *Locke v. Coleman*, 4 T. B. Mon. 315; and a purchaser at sheriff's sale has not, before the acknowledgment of the deed to him, such a right of possession as will sustain a lease made by him, *Hall v. Benner*, *supra*. In Vermont, by statute, a lease of lands held adversely to the lessor is void as to the adverse possessor. (Rev. Laws 1880), § 1953, p. 402.

Lease by Agent.

A lease made by an agent is of no effect unless the authority of the agent is conferred by an instrument of equal dignity with the lease itself, *Humphreys v. Browne*, 19 La. Ann. 158; *Judd v. Arnold* (Minnesota), 19 N. W. Rep. 151, S. C. 17 Reporter 629; and see *M'Dowell v. Simpson*, 3 Watts 129; thus, to execute a lease required to be in writing the agent's authority must be written, but where there is an oral lease for a term which may be created orally, the agent's authority may be shown by parol, *M'Gunnagle v. Thornton*, 10 S. & R. 251; *Miles v. Cook*, 1 Grant 58.

Where an agent without prior written authority has made a written lease of land and a ratification by his principal is relied on, that ratification must be in writing, *Judd v. Arnold*, *supra*. It has been held that an unauthorized lease may be ratified by parol, *Holbrook v. Chamberlain*, 116 Mass. 155; but in *M'Dowell v. Simpson*, 3 Watts 129, it was held that such a ratification would constitute the lessee but a tenant at will, and if suffered to hold for more than a year, a tenant from year to year; and there seems great force in the remark of the Supreme Court of Minnesota, in the case cited above, that to permit an oral ratification would

in many cases let in the very evils which the Statute of Frauds was intended to exclude.

Lease by Husband or Wife of the other's Land.

A wife has no implied authority to make a lease of her husband's land, *Administrator of Tullis v. Young*, 6 Ohio 294; but a lease for years made by a husband of his wife's land will be good for the life of the husband, *Eaton v. Whitaker*, 18 Conn. 222, provided that the marriage relation is not terminated before that time by a divorce; in which case, the husband's authority to lease being destroyed by the ceasing of the coverture, the lease will become of no further effect, *Wihelm v. Mertz*, 4 Greene (Iowa) 54.

Lease by Wife of her Land without Joining her Husband.

In the absence of statutes enabling a married woman to make a lease of her lands without her husband, his joinder is necessary to constitute a good lease of a married woman's land, *Murray v. Emmons*, 19 N. H. 483; *George v. Goldsby*, 23 Ala. 599. In the following States, married woman's acts and similar legislation have enabled the married woman to make a lease without the joinder of her husband: Massachusetts, Acts 1874, § 613; Maine, Acts 1852, c. 227; 1855, ch. 120, see *Allen v. Hooper*, 50 Me. 371; New York, see *Prevot v. Lawrence*, 51 N. Y. 219; *Knapp v. Smith*, 27 Id. 277; *Draper v. Stouvenal*, 35 Id. 512; *Vandecourt v. Gould*, 36 Id. 639; Illinois, Married Woman's Act of 1861, see *Parent v. Callerland*, 64 Ill. 97; New Hampshire, see *Albin v. Lord*, 39 N. H. 197, in which case the Court held that a wife could even make a lease to her husband; Michigan and Iowa, see Taylor, Landlord and Tenant, § 104, note 3; and from a dictum of SIMRALL, J., in *Harding v. Cobb*, 47 Miss. 599, it would seem that Mississippi should be included in this list, though Mr. Taylor, in his work on Landlord and Tenant, § 104, note 2, includes it among the States in which the husband's joinder is necessary.

Distinction between Agreement for Lease and Lease.

A lease is sometimes in words which at first sight seem to be a mere agreement for a lease, as "hereby agrees to let," "agrees to take," and it sometimes becomes important to determine whether a given paper is a lease or a mere contract to give or take one. In determining this question the intention of the parties to the contract, as discovered from the entire instrument executed by them, must govern. *Thornton v. Payne*, 5 Johns. 76;

Walls v. Preston, 25 Cal. 59; *Hallett v. Wylie*, 3 Johns. 44; *People v. Kelsey*, 38 Barb. 269; *Bacon v. Bowdoin*, 22 Pick. 401; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392; *Potter v. Mercer*, 53 Cal. 667, and see *Berger v. Palethorp*, 2 W. N. C. 297.

Where the paper, although it contains words which might by themselves be construed as an agreement for a lease, shows that no further assurance is contemplated by the parties, it will, in the absence of countervailing evidence, be held a lease, *People v. Kelsey*, 38 Barb. 269; *Hurlbut v. Post*, 1 Bosw. 28; *Jenkins v. Eldredge*, 3 Story 325; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392; and the actions of the parties may be taken into consideration in a doubtful case; thus, where possession is taken under the instrument, that fact will be material evidence in determining the question as to whether a lease or an agreement were intended, *Potter v. Mercer*, 53 Cal. 667; *Hallett v. Wylie*, 3 Johns. 44; but the taking of possession will not control the positive words of an agreement, *McGrath v. Boston*, 103 Mass. 369.

In *Shaw v. Farnsworth*, 108 Mass. 353, a letter offering to take a lease on certain terms and a reply thereto, accepting the terms and stamped with an agreement stamp, were held to constitute a lease.

In *Chung Yow v. Hop Chong*, 3 West Coast Rep. 328, the Supreme Court of Oregon held that where the owner of a building had posted a written notice asking for bids for a lease of the premises, received a bid which he accepted, and afterwards posted a notice that the bidder was the lessee and entitled to possession, a valid lease had been made.

Where a paper contains words of present demise and its execution is followed by possession under it, in such case, although it also contain a provision that a lease shall be given, it will be held a lease, *Jackson ex d. Livingston v. Kisselbrack*, 10 Johns. 336, in which case SPENCER, J., after citing *Goodtitle v. Way*, 1 D. & R. 735; *Doe v. Clare*, 2 Id. 739; *Doe v. Ashburner*, 5 Id. 163; *Baxter v. Browne*, 2 Bl. R. 973, said: "It is believed that there is no case of a present demise by apt words followed by possession in which the instrument has not been held to pass an immediate interest."

Where there are no words of present demise, and a future assurance or lease appears to have been contemplated, the instrument will be construed as an agreement for a lease only, *McGrath v. Boston*, 103 Mass. 369; *Becker v. De Forest*, 1 Sweeny 528; *Davis v. Thompson*, 13 Me. 209; *Weld v. Traip*, 14 Gray 330; *People v. Van Buren*, 24 Wend. 201; and the same is the case where some other further act is contemplated, which is to take place or be performed before the interest granted shall vest, as the fulfilment of a condition, *Howard v. Carpenter*, 11 Md. 259.

The same rule applies where it is sought to establish a parol lease.

Thus, where conversations had taken place, and the terms of a lease had been agreed upon, and the lessees had entered upon the premises of the lessor, but with the understanding that a formal lease should be drawn and executed, it was held that the conversation and action of the parties did not constitute a verbal lease, *Wolf v. Mitchell*, 24 La. Ann. 433; and see *Potter v. Mercer*, 53 Cal. 667.

In some cases, where there has been an agreement for a lease, which provides for the execution of a regular lease, and the tenant has gone into possession under the agreement, a court of equity will put the parties in the same position as though the lease, which ought to have been, had been actually executed, *Holmes v. McMaster*, 1 Rich. Eq. 340, and equity will also afford relief when a clause agreed to be inserted in the lease has been omitted by mistake or accident, *Wood v. Hubbell*, 10 N. Y. 479.

Relations between Parties as Affecting the Question of Tenancy.

The relations existing between the owner and the occupier of premises will often cause a paper, which would otherwise be considered a lease, to receive a different interpretation; thus a contract to give a person for his services a certain sum per day or per year, and a house to live in throughout the year, or so long as the parties agree, is held not to constitute a lease, but a contract of hiring, in which the use of the house becomes part of the employee's wages, *People v. Kerrains*, 1 T. & C. (N. Y. Sup'r Ct.) 333, and see *Watson v. McEachin*, 2 Jones Law 207; *McQuade v. Emmons*, 38 N. J. Law 397; *State v. Page*, 1 Spear 408; but the mere joinder of a personal contract for services will not destroy what otherwise would have been a lease. Thus, in *Porter v. Merrill*, 124 Mass. 534, a contract calling itself a lease for a definite time at a fixed rent per week was held a lease, although in it the lessor undertook to serve a private table to the lessee.

The relations between a Roman Catholic priest, who occupies the parsonage-house of the parish to which he is attached as rector or pastor, and his diocesan, in whom is vested the title to all the church property in the diocese, are such as to forbid the inference of a tenancy between them. See *Chatard v. O'Donovan*, 80 Ind. 20. In this case it was argued on behalf of the priest that he was a tenant and entitled to the rights of such, and on the part of the bishop that the relation of the priest to the bishop was rather that of a quasi servant. The Court, Woods, J., delivering its opinion, said: "While it may not be said upon the facts of the complaint, that the defendant was the hired servant of the bishop, it does appear that he was appointed to his position by and held it at the discretion of the bishop, and that his possession of the property was only an incident to

his appointment, the better to enable him to discharge the duties of his office; and when, in the exercise of that discretion which by the rules and customs of the Church he had the right to employ, the bishop removed the defendant from his charge or pastorate, his right to possession of the property at once necessarily ceased."

An agreement between tenants in common, that one of them shall occupy the whole of the premises, will not constitute a lease, *Medlin v. Steele*, 75 N. C. 154.

Means of Distinguishing between a Lease and an Agreement to Farm on Shares.

A question sometimes arises as to whether an instrument is a lease or an agreement to farm on shares, and in such cases the rule that all the terms of the contract are to be considered, in order to ascertain the intent of the parties, obtains, *Aiken v. Smith*, 21 Vt. 172; *Walls v. Preston*, 25 Cal. 59; *Lewis v. Lyman*, 22 Pick. 437. The mere fact that the landlord is to be compensated by the receipt of a certain portion of the produce is not by itself sufficient to determine the question. In *Walls v. Preston*, *supra*, RHODES, J., laid down the following rule: "It is the general rule that where a term is created, the possession given to the occupier, and the produce agreed to be paid is to be paid as rent, then the instrument is to be regarded as a lease. It is also a general rule that where the occupant covenants to deliver a portion of the crops, the agreement is held to be a cropping contract, a letting upon shares, and the owner and occupier are tenants in common of the crops."

The question had been previously considered by the Supreme Court of New York in *Putnam v. Wise*, 1 Hill 247, where the true test was said "to lie in the question whether there be any provision, in whatever form, for dividing the specific product of the premises." In that case A., by the usual words of leasing, let certain land with certain provisions as to its cultivation, and was to receive one-half of its products. In delivering the opinion of the Court, COWEN, J., said: "To show that the relation was that of lessors and lessees, and the covenant to deliver the grain was but an agreement to render a share by way of rent, we are referred to the case of *Stewart v. Doughty*, 9 Johns.R. 108, 113; there the words of demise and covenant to pay a share of the crop were almost literally and clearly in legal effect the same as here, and the contract was held to be a lease. The only difference was in the length of the term. There it was five years, with the right of either party to terminate it on six months' notice; here only one year, with a privilege in the occupiers to continue for another.

The shortness of the term, I admit, may be evidence of an intent to hold the crop in common; but is that circumstance alone able to overcome words of express demise and covenant to pay which have a settled construction in the law? Had the covenant been to pay a fixed quantity . . . though to come out of the products of the farm, it seems perfectly settled that the lessor would have taken no present interest whatever. . . . What was said in *Jackson ex d. Colden v. Brownell*, 1 Johns. R. 267, went on the distinction between letting on shares for a single crop and for a year certain. In the latter case it was said to be a demise because for a year. That view was overruled in *Caswell v. Districh*. . . . Mr. Justice NELSON said that the shares were of specific crops to be raised on the farm, and he adds, 'this view of the contract should be maintained unless otherwise clearly expressed.' He thought the case distinguishable from *Stewart v. Doughty*, where the phraseology, being that usual in leases, could not be got over by an agreement to pay in shares from the specific crops. With deference, I have not been able to make any substantial distinction in the phraseology. Independently of the fact that the render was confined to a share in the specific crop it would, as appears to me, in both cases have operated to make a lease. In *Caswell v. Districh*, the agreement was to let the defendant have the farm for one year. These, says Woodfall, are apt words to make a lease. . . . The words in *Stewart v. Doughty* were no more; but if they were, Woodfall says, the most proper and authoritative form of words may be overcome by a contrary intent appearing in the deed of demise. It seems to me, therefore, that *Stewart v. Doughty* was very much shaken, not to say overturned, by *Caswell v. Districh*; at any rate, that the question is open whether the clearest words of letting and demise may not be considered as inuring to make a mere tenancy in common under a letting like the one before us, and I am of opinion that they may." The Court held that the contract before it was a letting on shares, and see *Walker v. Fitts*, 24 Pick. 191; *Bernal v. Horious*, 17 Cal. 544. An agreement that one party shall raise a single crop upon the land of the other will not amount to a lease, *Bishop v. Doty*, 1 Vt. 37, and see *Bradish v. Schenck*, 8 Johns. 151; nor will an agreement in terms for one year, or from year to year, the occupants to raise crops and pay a proportion thereof to the owner, *Caswell v. Districh*, 15 Wend. 379; *Lewis v. Lyman*, 22 Pick. 437; *Aiken v. Smith*, 21 Vt. 172, and see *Stewart v. Doughty*, 9 Johns. 108.

Where there is a stipulation that the lessee shall pay or deliver to the lessor a certain amount of produce, without reference to what proportion that amount may bear to the whole crop of the land, the instrument is to be held a lease, although the render is expressed to be out of the product of the land, *Dockham v. Parker*, 9 Greenl. 137; *Newcomb v. Ramer*, 2 Johns. 421, note.

Contract for Cultivation, the Cultivator to Receive Part of the Crop, not a Lease.

A contract that one shall cultivate a farm of another as overseer, and receive as compensation a portion of the crop raised, is not a lease. *Himesworth v. Edwards*, 5 Harring. 376; and see *Brown v. Coats*, 56 Ala. 439.

Lease may be in Terms Resembling Mortgage.

A lease drawn in terms which resemble those of a mortgage has been sustained as a valid lease. Thus in *Stadden v. Hazzard*, 34 Mich. 76, there was an instrument running as follows: "S. E. W. agrees to demise and let to H." certain real estate "for the term of one year, etc. In consideration of this lease, H. agrees to pay W. \$500, \$125 to be paid within fifteen days from the date hereof, balance to be paid within one year from the date." It was held that the instrument was not a mortgage, but a lease.

Lease may be Combined with a Conditional Sale.

A valid lease may be combined with a conditional sale, *Christie & Scott's Appeal*, 85 Pa. St. 463; or with a privilege of purchase, *Municipality No. 1 v. General Council of New Orleans*, 5 La. Ann. 761; but it has been held that a covenant, in a lease, for an indefinite renewal will be struck down as in contravention of the policy of the law, *Morrison v. Rossignol*, 5 Cal. 64.

Reservation by Lessor of Right to Terminate Lease by Sale of Premises.

A valid lease may contain a reservation of the lessor of the right to sell the premises, and so determine the lease before the expiration of the time for which it is expressed to be made, *Sutherland v. Goodnow*, 108 Ill. 528.

Lease must be Signed by Lessor.

To constitute a paper a good lease it must be signed by the lessor, *Clemens v. Bromfield*, 19 Mo. 118. Usually the lessee also signs, but if he enter and enjoy the premises under a lease not signed by him, he takes subject to all the covenants and obligations thereof, *Fitton v. Inhabitants of Hamilton*, 6 Nev. 196; so if he enter under a lease made to another person, *Winston v. President and Trustees of Franklin Academy*, 28 Miss. 118; although it

seems that covenant cannot be maintained by a landlord upon a lease signed by him only, *Hinsdale v. Humphrey*, 15 Conn. 431.

Parol Leases.

We have so far, except incidentally, considered only those leases which are made by writing; but it is to be borne in mind that a good lease may be made by parol, except where prohibited by the Statute of Frauds, or by those statutes which in the various States of the Union take its place; and where a lease is made by parol it can be proved by the same species of evidence, *M'Donald v. Stewart*, 18 La. Ann. 90; and the binding character of a parol lease was maintained in *Scott et al. v. Hawsman*, 2 M'L. 180, where it was held that a parol lease repudiated by the lessee who had enjoyed the premises named in it, might still be treated as subsisting by the lessor; but in Louisiana it is held that a parol lease will not bind the subsequent purchaser of the fee, *Brown v. Martin*, 9 La. Ann. 505.

Leases as Affected by Statute of Frauds.

A lease is within the Statute of Frauds, *Gano v. Vandever*, 34 N. J. Law 293; *Folsom v. Perrin*, 2 Cal. 603; *Janes v. Finny*, 1 Root 549; *Phipps v. Ingraham*, 41 Miss. 256. In *Wilber v. Paine*, 1 Ohio 251, the Court held that a parol lease in violation of the terms of the statute would be validated by possession. This case, which is not very fully reported, is cited and followed in *Moore v. Beasley*, 3 Oh. 294, and in *Grant v. Ramsey*, 7 Oh. St. 158, in which latter case SCOTT, J., said: "We suppose it to be no longer questionable in this State that a parol lease for one year, when the tenant is put into possession, is valid notwithstanding the terms of the statute."

The Ohio cases, however, are contrary to the line of decided authorities, which, while they are not at one as to the precise effect of a lease in violation of the statute, nevertheless are unanimous in not giving to it the effect intended by the parties. It has been held that a lease by parol for a time, which the statute requires to be put in writing, will be a valid lease for the time for which a parol lease could legally have been made, *Shepherd v. Cummings*, 1 Cold. 354; *Porter v. Gordon*, 5 Yerg. 100; *Brockway v. Thomas*, 36 Ark. 561; *Hauser v. Romer*, 4 Ky. Law Rep. 815; *Friedhoff v. Smith*, 13 Neb. 5; and that the verbal agreement between the lessor and lessee will regulate the terms of the tenancy as to notice to quit, rent, etc.; *Shepherd v. Cummings*, 1 Cold. 354; *Evans v. Winona Lumber Co.*, 30 Minn. 515; *Nash v. Berkmeir*, 83 Ind. 536; but, on the other hand, it has been

held that such a lease will operate only as a lease from year to year, *Drake v. Newton*, 23 N. J. Law 111; *Lounsbery v. Snyder*, 31 N. Y. 514; *Gretton v. Smith*, 33 Id. 245; as creating an estate at will, *Ellis v. Paige*, 1 Pick. 43; and even that it will be void altogether, and not provable for any purpose whatsoever, *Scotten v. Brown*, 4 Harring. 324, and see *Thomas v. Nelson*, 69 N. Y. 118. In Pennsylvania, while an oral lease which exceeds the statutory time will, if an annual rent is reserved, be held a lease from year to year, still, if a gross sum is fixed as the compensation for the whole term granted, the estate will be at will only, *Stover v. Cadwallader*, 2 Pennyp. 117.

A parol lease for one year, to begin *in futuro*, has been held to be in violation of the Statute of Frauds, and void, *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Atwood v. Norton*, 31 Ga. 507; *Delano v. Montague*, 4 Cush. 42; *Pulse v. Hamer*, 8 Oreg. 251; *White v. Holland* (Oregon), 2 W. C. Rep. 671; *Parker's Adm'r v. Hollis*, 50 Ala. 411; *Croswell v. Crane*, 7 Barb. 191 (the authority of the last case is, however, much shaken by *Taggard v. Roosevelt*, 2 E. D. S. 100); but the contrary doctrine was held in *Huffman v. Starks*, 31 Ind. 474, in which case the Court questioned the accuracy of its decision in *Stackberger v. Mosteller*, 4 Ind. 461, where the law was held as above stated; and see *Taggard v. Roosevelt*, *supra*.

The time for which a lease can be validly made by parol, under the statutes of the various States, is as follows:

One year—Alabama, Code (1876), § 2121, p. 560; Arkansas, Rev. Stat. (1874), § 2951, p. 561, § 2960, p. 563; California, Civil Code (Hettell's Suppl., 1880), § 6624, p. 235; Colorado, Gen. Laws (1877), § 1258, p. 477; Connecticut (in case the leased premises have been actually occupied by the lessee or any person claiming under him), Gen. Stat. (Revision of 1875), Tit. 19, Ch. 12, § 40, p. 441; Delaware, Rev. Code, Ch. CXX., § 3; Florida, McClellan's Digest (1881), Ch. 29, § 1, p. 208; Illinois, Pub. Stat. (Hurd, 1880), Ch. 59, § 2; Iowa, McClain's Ann'd Stat. (1880), § 3364; Kansas, Cons. Laws (1879), § 2663, p. 468; Kentucky, Gen. St. (Bull. & Fel. 1881), Ch. 22, § 1, pp. 248–9; Michigan, Howell's Ann'd Stat. (1882), § 6179, p. 1599; Minnesota, Stats. (1878), Art. 41, Tit. 2, §§ 10, 12, p. 543; Mississippi, Code (1880), § 1188, p. 344, § 1292, pp. 370–1; Nebraska, Comp. Stat. (1881), Ch. 32, § 3 *et seq.*; Nevada, Comp. Law (1873), §§ 58–9; New York, Rev. St. (1882), Pt. 2, Ch. VII., Tit. 1, §§ 6, 8; Oregon, Gen. Laws (1872), Civil Code, § 775, p. 265; Rhode Island, Pub. Stat. (1882), Tit. XXVI., Ch. 204, § 7, p. 552; Tennessee, 1 Stat. (1871), § 1758, p. 831; Texas, Rev. Stat., Tit. XLVI., Art. 2464, p. 363; Virginia, Code (1873), Ch. CXL., § 1, p. 985; West Virginia, Rev. Stat. (1879), Ch. 95, § 1, p.

636; Wisconsin, Rev. Stat. (1878), Ch. CIV., §§ 2302, 2304, p. 654; South Carolina (provided the rent reserved shall amount to two-thirds of the full improved value of the premises demised), Gen. Stat. (1882), Tit. VI., Ch. LXXIII., § 2017, p. 587.

Three years—Indiana, Rev. Stat. (1881), § 4904, p. 1055; Pennsylvania, Act 21 Mar., 1772, § 1, Purd. Dig., p. 723, pl. 1; New Jersey, Rev. of 1877, p. 444, pl. 4.

In Massachusetts, Pub. Stat. (1882), Ch. 78, §§ 1, 2, p. 429; Maine, Rev. Stat. (1871), Ch. 111, § 1, p. 786; Missouri, 1 Rev. Stat., Ch. 35, § 2509, p. 420; New Hampshire, Gen. Laws (1878), Ch. 135, § 12, p. 324; Vermont, Rev. Stat. (1880), § 1932; the statutes give all verbal leases the force of estates at will only.

In Ohio, the statute is very forcible in terms, providing that "no lease, estate or interest either of freehold or term of years . . . shall be assigned or granted except by deed or note in writing," Rev. Stat. (1884), § 4198; but, as we have seen, the decisions of the courts have practically nullified the statute in cases where possession is given. See *ante*, p. 53.

In North Carolina, the Statute, Battle's Rev. (1873), Ch. L., § 10, avoids all leases not in writing. For an account of the fluctuations in the North Carolina rule, see 3 Reed on Statute of Frauds (App.), p. 325, note *w*.

In Georgia and Maryland, the English Statute of Frauds, 29 Car. II., Ch. 3, is in force. See Prince's Laws of Georgia (1820), p. 310, Alexander's British Statutes in Force in Maryland, 508, 3 Reed on Statute of Frauds (App.), p. 306. By its terms a lease can be made for a term not exceeding three years, provided the rent reserved to the landlord is equal to two-thirds of the improved value of the thing demised.

In Delaware, a lease to be good for more than one year must be under seal as well as signed, and if a written, unsealed lease is made for a longer period it will be held good for one year only, *Stewart v. Apel*, 5 Houst. 189; but if continued beyond the year, without notice to terminate, the tenancy being given, it will become a lease from year to year, *Id*.

In Tennessee, the Statute of Frauds requires all leases for a term of more than one year to be in writing, 1 Stat. (1871), § 1758; Milliken & Vertrees, Authorized Gen. Stats. (1884), § 2423; the phraseology of 1 Stat. (1871), § 2002; M. & V., § 2808, would seem to conflict with this, and, being a statute passed several years after the first-mentioned, to enlarge the extent of a valid parole lease to three years; but the later statute is not regarded by the profession in Tennessee as a statute of frauds, and its effect is confined to the requirement of registration of leases for terms of over three years. There is, however, a decided conflict in the terms of the acts, and the later act is an example of careless legislation.

Statutory Requirement of Registration.

In some States of the Union leases for more than a certain number of years are required by statute to be registered or recorded, and the effect of an omission to record a lease within the provision of the statute differs in different States. In Rhode Island, it is held that an unregistered lease will create a tenancy from year to year only, but will regulate the terms of the holding in all respects except as to time, *Thurber v. Dwyer*, 10 R. I. 355; in Tennessee, an unregistered lease for a period in excess of the prescribed time is not valid, even for the time for which a lease might have been made without being required to be registered, *Clift v. Stockdon*, 4 Litt. 215; but it is held that the purchaser at an execution sale of a leasehold takes subject to the conditions of the lease although not recorded, *Snowden v. Memphis Park Association*, 7 Lea 225; in Louisiana, an unregistered lease is held to be without effect upon the purchaser of the reversion, *Brown v. Matthews*, 3 La. Ann. 198, or upon third persons generally, *Anderson v. Comeau*, 33 La. Ann. 119; in Iowa, constructive notice of an unregistered lease will not affect persons not parties thereto, *Wihelm v. Mertz*, 4 Greene (Iowa) 54. In Nebraska, it is held that an unrecorded lease will be valid against subsequent lessees having notice, *Weaver v. Coumbe*, 15 Neb. 167.

The time fixed beyond which to render a lease valid, as against all persons, it must be recorded, is in different States as follows:

Seven years.—Maine, Stat. 604, § 8; Maryland, Rev. Code, Art. XLIV., § 1, p. 383; New Hampshire, Comp. Laws (1881), Ch. 21, § 211, p. 698; Massachusetts, Pub. Stat. (1882), Ch. 120, § 4, p. 732. In the last named State, a lease for less than seven years, but whose term, beginning in futuro, will not expire within seven years from the date of the instrument, is held to require recording, *Chapman v. Gray*, 15 Mass. 439.

Five years.—Kentucky, Gen. St. (Bull. & Fel.), Ch. 24, § 8, p. 255.

Three years.—Minnesota, Statutes (1878), Ch. 40, § 26, p. 538; Ohio, Rev. St. (1880), § 4134, p. 1034; § 4112, p. 1030; Tennessee, Statutes (1871), § 2030, sub. 13, p. 946; New York, 3 Rev. St. (Throop), 1882, p. 2215, § 1; p. 2222, §§ 36, 38; 1 R. S., pp. 756, 762; Michigan, Howell's Am. Stat. (1882), § 5689, p. 1478; Wisconsin, Rev. Stat. (1878), §§ 2241, 2242, p. 641.

One year.—South Carolina, Rev. St. (1873), Ch. LXXXIV., § 1, p. 433; Rhode Island, Rev. St., Ch. 146, § 7; Nebraska, Comp. Stat., Ch. 73, § 1.

Twenty-one years.—Pennsylvania and Delaware. In the former State, provided "actual possession and occupation goeth along with the lease," Act Mar. 18, 1775, §§ 1, 3. Pur. Dig., pp. 472, 473, pl. 76, 78; and in the

latter, provided the lease is at a fair rent, is accompanied by possession, or the lessee is to come into possession within one year after making the lease, Rev. Code (1874), Ch. 83, § 17, p. 503, an unrecorded lease is valid.

In Vermont the provision is general—leases must be recorded, Rev. Laws (1880), § 1922, p. 398.

In North Carolina all leases required to be in writing must be registered. Battle's Rev., Ch. 35, § 24, p. 356.

What is Embraced in a Lease.

A lease carries with it not only what it expressly names, but what is appurtenant thereto and necessary for its enjoyment, *Riddle v. Littlefield*, 53 N. H. 503. Thus the demise of a building carries with it the land upon which it stands, *Bacon v. Bowdoin*, 22 Pick. 401; *McMillan v. Solomon*, 42 Ala. 356; *Rogers v. Snow*, 118 Mass. 118; *Hooper v. Farnsworth*, 128 Mass. 487; the land under its eaves, *Sherman v. Williams*, 113 Mass. 483, and to the middle of a private way adjoining a building leased as a store, *Hooper v. Farnsworth*, *supra*. A lease of land on a river front, for dock-yard purposes, carries with it the lessor's privilege in a dock attached to the land by a permanent staging, *Cochran v. Ocean Dry-dock Co.*, 30 La. Ann. 1365; a lease of a factory usually run by water-power carries with it the lessor's right to the water-power, *Wyman v. Farrar*, 35 Me. 64; but a mere personal contract made by a third party with the lessor or his former tenant will not be conveyed to the lessee by the lease, *People v. Chicago and North-Western Railroad Co.*, 57 Ill. 436. Accretions during a term are covered by the lease, *Cobb v. Lavalle*, 89 Ill. 331. In *Riddle v. Littlefield*, 53 N. H. 503, the curious question was raised whether the outside wall of a house was included in the lease of a house, so that the landlord could not, during the term, rent the wall for advertising purposes, as he had been accustomed to do during the occupancy of a former tenant. It was held that the lease vested both sides of the wall in the lessee.

Distinction between a Lease of a House and a Lease of a Portion thereof.

A distinction, however, is to be taken between the lease of a house and of a portion thereof, or apartments therein. In the former case, as we have seen, the lease carries with it the land on which the house stands; but in the latter case the lessee takes no interest in the land, or in the space occupied by his portion of the house, considered abstractly and

apart from the erection. Thus, in *Winton v. Cornish*, 5 Ohio 477, a lease had been made of the cellar and rooms above of a certain building. The building was destroyed by fire, and the tenant roofed in the space he had formerly occupied. It was held he had no right to do so. In delivering the judgment, COLLETT, J., said: "The owner of land can convey it or the profits of it for such terms and in such parcels as he thinks proper. He can grant the right to take all the minerals underneath or those twenty feet below the surface only; to dig all the turf, to inhabit a cave, if there is one, to occupy a room in the third story, to occupy the second story, a room in the first story, or the cellar or a part of the cellar. By such grants the land does not pass When a cave is destroyed by a convulsion, or otherwise, there is nothing that was granted remaining. It is so of the rooms or the cellar of a house. The lessees of the middle story of a house are limited above and below, as well as on the sides, yet the land is as necessary to sustain their part of the house as that below By the granting of the cellar the whole profits of the land underneath are not parted with, nor by the granting of any one or two rooms when they are overhung by others." This case was followed in *Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. 315, in which it was held that a lease of rooms in a building which was afterwards destroyed by fire gave the tenant no right to rooms in a new building erected on the site of the old one. And see *Stockwell v. Hunter*, 11 Metc. 448; *McMillan v. Solomon*, 42 Ala. 356; *Buerger v. Boyd*, 25 Ark. 441; *Austin v. Field*, 7 Abb. Pr., N. S. 39; *Graves v. Berdan*, 26 N. Y. 498; *Womack v. McQuarry*, 28 Ind. 103; *Ainsworth v. Ritt*, 38 Cal. 89; *Shawmont National Bank v. Boston*, 118 Mass. 125; *Harrington v. Watson* (Supreme Court of Oregon), 17 Reporter 184.

Implied Covenant for Quiet Enjoyment.

It may be stated, as the general rule, that all leases imply a covenant on the part of the landlord for the quiet enjoyment of the demised premises by the lessee, *Duff v. Wilson*, 69 Pa. St. 316; *Moore v. Weber*, 71 Id. 429; *Baughner v. Wilkins*, 16 Md. 35; *Gazzolo v. Chambers*, 73 Ill. 75; *Ross v. Dysart*, 33 Pa. St. 452; *Owen v. Wight*, 5 McCrary 642.

The words "demise" and "grant" have always been recognized as raising the implied covenant of quiet enjoyment, *Foster v. Peyser*, 9 Cush. 243; *Barney v. Keith*, 4 Wend. 502; *Grannis v. Clark*, 8 Cow. 36; *Maeder v. City of Carondelet*, 26 Mo. 112; *Hazlett v. Powell*, 30 Pa. St. 293; *Young v. Hargrave's Adm'r*, 7 Ohio, Pt. 2, 394; *Stott v. Rutherford*, 2 Otto 107. In the case of *Lovering v. Lovering*, 13 N. H. 513, the Supreme Court of

New Hampshire was inclined to restrict the phraseology which would raise the covenant. In that case the question was upon the effect of the words "let and lease." GILCHRIST, J., in delivering the opinion of the Court, said: "No case is to be found where the words let and lease imply a covenant. The case cited by the counsel for the plaintiff, from 1 Esp. 317, is *Andrews' Case*, Cro. Eliz. 214, where the words of the lease were *concessi et ad firman tradidi*. The implied covenant in that case depended not upon the words *ad firman tradidi*, but on the word *concessi*." The same question came afterwards before the Supreme Court of Pennsylvania, in *Maule v. Ashmead*, 20 Pa. St. 482, and a much more liberal doctrine was held, BLACK, C. J., saying: "It is not denied that the word *demisi* in a lease implies a covenant for quiet enjoyment during the term; that word was not used here, for the lease was by parol, and the parties did not understand Latin. But the word lease is a fair translation of *demisi*, and ought to be so interpreted by the courts." It is thought that the law will be generally held, at the present day, that any words which show an intention to create a term of years will be sufficient to cause the implication of a covenant for quiet enjoyment, see *Shep. Touch.* 165, 167, *Foster v. Peyser*, 9 Cush. 243; but it appears that there must in the letting be some words used which can give rise to a legitimate implication of the covenant, and that it will not be held to arise out of the mere relation of landlord and tenant, *Gano v. Vanderveer*, 34 N. J. Law 293; *Naumberg v. Young*, 44 Id. 332.

Implication of Covenant for Quiet Enjoyment may be Destroyed.

The implication of a covenant for a quiet enjoyment may be destroyed not only by the use of express words, as stated in *Burr v. Stenton*, 43 N. Y. 462, *Maeder v. City of Carondelet*, 26 Mo. 112; but also where an express covenant in the lease specifies what is to be done by the lessor to secure to the lessee quiet enjoyment of the demised premises, and so supplies the place of the implied covenant, as in *O'Connor v. City of Memphis*, 7 Lea 219, where a covenant that the lessor should aid the lessee in keeping possession was held inconsistent with an implied covenant for absolute quiet enjoyment.

Covenant for Quiet Enjoyment may be Implied in New York since the Passage of Revised Statutes.

It is to be noted that the provision of the New York Revised Statutes, Vol. 1, p. 738, § 140, that no covenant shall be implied in any conveyance

of real estate, was originally held to apply to leases, *Kinney v. Watts*, 14 Wend. 38, and see also the dictum of BRONSON, J., in *Greenvault v. Davis*, 4 Hill 643; but the law is now settled to be otherwise, and the covenant for quiet enjoyment may be implied in spite of the statute in all cases of a demise for a lease not exceeding three years. *Mayor of New York v. Mabie*, 13 N. Y. 151 (expressly overruling *Kinney v. Watts*); *Burr v. Stenton*, 43 Id. 462; *Borrell v. Lawton*, 90 Id. 293; and see *Moffat v. Strong*, 9 Bosw. 59.

The same has been held in Wisconsin, whose revised statutes are, with some modifications, copied from those of New York. See *Eldred v. Leahy*, 31 Wisc. 546.

Covenant may be Implied in an Oral Lease.

The lease need not be in writing to give use to the implied covenant; it will be implied in an oral lease, *Maule v. Ashmead*, 20 Pa. St. 482.

Effect of the Implied Covenant.

The undertaking on the part of the lessor by his implied covenant is that the tenant shall not be dispossessed or disturbed in his enjoyment of the premises by the lessor, or any person claiming under him, or by the lawful act of any one having the legal title or right of entry to the land, *Wade v. Halligan*, 16 Ill. 507; *Foster v. Petser*, 9 Cush. 243; it is not a contract to indemnify the tenant against the acts of a wrongdoer or trespasser, *Baughner v. Wilkins*, 16 Md. 35; *Sigmund v. Howard Bank of Baltimore*, 29 Id. 324; *Gazzolo v. Chambers*, 73 Ill. 75; or against an action of ejectment brought by a third person, *Schuylkill v. Dauphin Railroad Co.*, 57 Pa. St. 271; or against the exercise by the State of the right of eminent domain, Id.; *Frost v. Earnest*, 4 Whar. 86; *Dyer v. Wightman*, 66 Pa. St. 425; in such case the tenant must look for his compensation to legislative provisions, *Frost v. Earnest*, *supra*.

Implied Covenant for Quiet Enjoyment does not Require Lessor to Put Lessee in Possession.

The implied covenant does not require the lessor to put the tenant in possession of the demised premises; it is sufficient that the legal right become vested in the lessee, for he can then enforce it through the remedies provided by law, *Sigmund v. Howard Bank*, 29 Md. 324; *Mechanics' and Traders' Ins. Co. v. Scott*, 2 Hilt. 550; *Burton v. Rohrbeck*, 30 Minn. 393; thus where the tenant is kept out of possession by the holding over of a

former tenant there is no breach of the covenant, *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; and see *Cozens v. Stevenson*, 5 S. & R. 421; but if the lessee is kept out of possession by one having a superior title to that of the lessor, the covenant is broken, for it implies that the lessor has a right to demise, *Greenvault v. Davis*, 4 Hill 643; *Grannis v. Clark*, 8 Cow. 36; *Poston v. Jones*, 2 Ired. Eq. 350.

And the covenant is also broken where, after executing a lease, the lessor does any positive act which keeps the lessee out of possession; thus in *Trull v. Granger*, 8 N. Y. 115, where a lease was executed by which possession was to be given at a time certain, and the landlord subsequently leased the premises for five years to a third person, who, on the arrival of the time at which the first lease was to commence, refused to give up the premises, and the landlord refused to give possession thereof, it was held that the lessee need not bring ejectment, but could at once sue the landlord for damages.

English Doctrine as to Implied Covenant Requiring Lessor to Put Lessee in Possession followed in Alabama.

The American doctrine, which is as above stated, differs from that held in England, which is that "he who lets, agrees to give possession and not merely the chance of a lawsuit," *Coe v. Clay*, 5 Bing. 440. This doctrine has been followed in this country by the Supreme Court of Alabama in a very able and learned opinion in *King v. Reynolds*, 67 Ala. 229, in which STONE, J., after reviewing the authorities and discussing the question upon principle, sums up the effect of the implied covenant as follows: "We hold that where there is a contract of lease and no stipulations to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession under the lease according to the terms of the contract, the premises shall be open to his entry. In other words, that there shall then be no impediment to his taking possession. But this implied covenant or agreement does not extend beyond that time. If, after the time when the lessee is entitled to have the possession according to the terms of the contract, a strange person take possession and hold, this is a wrong done to the lessee, for which the lessor is in no way responsible. And this is the rule whether the trespass is committed before or after the lessee obtains actual possession. The lessor's covenant extends no farther than to guaranty he had authority to make the lease, and that the premises will be open for occupancy, when the contract gives the lessee the right to enter."

L'Hussier v. Zallee, 24 Mo. 13, and *Hughes v. Wood*, 50 Id., are sometimes cited as cases which follow the English rule. See *King v. Reynolds*,

supra, at page 231, and *Field v. Herrick*, 14 Bradw. 181, but it is very questionable how far they support the position for which they are cited. In the report of neither of them is the lease set out. The first was a case in which the plaintiff had leased to the defendant a room for three years, with the condition that if the plaintiff should at any time lease the whole of the house the lease of the room should become void. He did lease the whole of the house, the defendant refused to surrender the room, and the plaintiff brought an action of forcible detainer. The Court held that the plaintiff could not move in the matter until the second lessee had made his election whether he would bring ejectment or sue the plaintiff for breach of contract in not putting him in possession. No light is given by which to judge whether the contract to put in possession were express or implied. It is true *LEONARD, J.*, does seem to go to the full extent of the English doctrine, but his was a dissenting opinion, and while *Coe v. Clay* is cited in the opinion of the Court, it is in support of the following dictum: "As the case now stands it does not appear that the alienee still claims possession of the lot under his conveyance. If he does, what right has *L'Hussier* to sue for it?" The same objection, *i. e.* that we have no means of judging whether the terms of the lease would not of themselves make a covenant to give possession, apart from any implied covenant, or not, will apply to *Hughes v. Wood*. The result of an examination of these cases is that while the law of Missouri may follow the English rule, it is unsafe to predicate such an assertion on the cases above cited, and the only State in which we can affirm with confidence that the English rule is followed is Alabama.

No Covenant as to Condition of Premises Implied in a Lease.

There is in a lease no implied covenant as to the condition of demised premises, even when they are demised for a particular purpose, *McGlashan v. Tallmadge*, 37 Barb. 313; *O'Brien v. Capwell*, 59 Barb. 497; *Mayer v. Moller*, 1 Hilt. 491; *Cleves v. Willoughby*, 7 Hill 83; *Hazlett v. Powell*, 30 Pa. 293; *Libbey v. Tolford*, 48 Me. 316; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Id. 243; *Carson v. Godley*, 26 Pa. St. 111; *Schleppi v. Gindele*, 14 W. N. C. 31; or that the premises shall continue during the term as when demised, *Moore v. Weber*, 71 Pa. St. 429; *Hazlett v. Powell*, *supra*; *Robbins v. Mount*, 4 Robt. (N. Y.) 553; *Welles v. Casiles*, 3 Gray 323; *Branger v. Manciet*, 30 Cal. 624.

A covenant has sometimes been implied from the description of premises in a lease that they were as described. Thus in *Vaughan v. Matlock*, 23 Ark. 9, a lease of ground, "together with the proof brick cotton warehouse built thereon," was held to raise an implied covenant that the building was fire-

proof; and in *La Farge v. Mansfield*, 31 Barb. 345, where the lease was of a "store" in a building in the course of erection, and was with the understanding that there should be a furnished store fit for immediate occupancy, it was held that a covenant to that effect should be implied; but in *Naumburg et al. v. Young et al.*, 44 N. J. Law 332, where there was a lease of premises described as a "brick factory," containing a covenant that the premises should be used only as a button factory, it was held that there was no implied covenant that the building was fit for the purpose for which it was to be used.

Covenant Raised by Fraud.

It has also been held that where a lessor fraudulently conceals the untenable condition of the premises he leases, the fraud will, as it were, raise an implied covenant of a tenable condition, *Wallace v. Lent*, 29 How. Pr. 289; and see the remarks of HARE, J., in *Wien v. Simpson*, 2 Phila. 158, and *Jackson v. Odell* (N. Y.), 18 Reporter 245; but mere false representation in a case in which the tenant could have discovered the true condition of the premises will not raise such a covenant, *Schermerhorn v. Gouge*, 13 Abb. Pr. 315; and where the representation is not in bad faith the law will not imply a covenant, *Wilkinson v. Clauson*, 29 Minn. 91.

Estoppel of Tenant to Deny Lessor's Title.

One striking incident of the possession of an estate for years is that the tenant is estopped from denying the title of his lessor, or, in general, of one to whom the tenant has attorned, and setting up against him an outstanding or paramount title either in a third person or in the tenant himself, *Pope v. Harkins*, 16 Ala. 321; *Randolph v. Carlton*, 8 Id. 606; *Fitzgerald v. Beebe*, 7 Ark. 310; *Nolan v. Royston*, 36 Ark. 561; *Brewer v. Keeler*, 42 Id. 289; *Shephard v. Martin*, 31 Mo. 492; *Jackson ex d. Smith v. Stewart*, 6 Johns. 34; *Jackson ex d. Colton v. Harper*, 5 Wend. 246; *Jackson ex d. Wells v. Stiles*, 1 Cow. 575; *Jackson ex d. Sagoharie v. Dobbin*, 3 Johns. 223, note a; *People v. Stiner*, 45 Barb. 56; *Trustees of Green v. Robinson*, Wright (Oh.) 436; *Isaac and Wife's Lessee v. Clarke*, 2 Gill 1; *Arnold v. Woodward*, 4 Col. 249; *Cody v. Quarterman*, 12 Ga. 386; *Walker v. Harper*, 33 Mo. 592; *Winston v. President and Trustees of Franklin Academy*, 28 Miss. 118; *Lessee of Galloway v. Ogle*, 2 Binn. 468; *Cooper v. Smith*, 8 Watts 536; *Porter v. Mayfield*, 21 Pa. St. 263; *Parker v. Nanson*, 12 Neb. 419; *Turner v. Lowe*, 66 N. C. 413; *Hamel v. Lawrence*, 1 A. K. Mar. 330; *Hamit v. Lawrence*, 2 Id. 366; *St. John v. Quit-*

zow, 72 Ill. 334; *Philip's Lessee v. Robertson*, 2 Overt. 399; *Robinson v. Hathaway*, Brayt. 150; *Anderson v. Darby*, 1 Nott. & M'C. 369; *Conley's Heirs v. Chiles*, 5 J. J. Mar. 302; *M'Intire v. Patton*, 9 Humph. 447; *Rogers v. Waller*, 4 Hayw. 205; *Burke v. Hale*, 9 Ark. 328; *Tondro v. Cushman*, 5 Wisc. 279; *Shelton v. Eslava*, 6 Ala. 230; *Cook v. Cook*, 28 Id. 660; *Doe v. Reynolds*, 27 Id. 364; *Smith v. Mund*, 18 Id. 182; *Griffith v. Parmley*, 38 Id. 393; *Russell v. Irwine's Adm'r*, Id. 44; *Bishop v. Lalouette's Heirs*, 67 Id. 197; *Houston v. Farris*, 71 Id. 510; *Lucas v. Brooks*, 18 Wall. 436; *Tuttle v. Reynolds*, 1 Verm. 80; *Bowker v. Walker*, Id. 19; *Greeno v. Munson*, 9 Id. 37; *Jackson ex d. Bleecker v. Whitford*, 2 Caines 215; *Lively v. Ball*, 2 B. Mon. 53; *Grant v. White*, 42 Mo. 285; *Plumer v. Plumer*, 30 N. H. 558; *Hood v. Mather*, 21 Mo. 308; *Williams v. Cash*, 27 Ga. 507; *Ankeny v. Pierce*, Breeze 202; *Hardin v. Forsythe*, 99 Ill. 312; *Henley v. Branch Bank*, 16 Ala. 552; *Jackson v. Whedon*, 1 E. D. Sm. 141; *Love v. Dennis*, Harp. 70; *Doggett v. Norton*, 20 Ill. 332; *Vrooman v. McKaig*, 4 Md. 450; *Bigler v. Furman*, 58 Barb. 545; *Frazer v. Robinson*, 42 Miss. 121; *Wilson v. Hubbell*, 1 Pennypacker 413; *Pacquetel v. Gauche*, 17 La. Ann. 63; *Sientes v. Odier*, Id. 153; *Phelps v. Taylor*, 23 Id. 585; *Dennis-toun v. Walton*, 8 Rob. (La.) 231; *Nicholls v. Byrne*, 11 La. 173; *Tippet v. Jett*, 10 La. 362; *Epstein v. Geer*, 78 Ind. 348; *People's Loan and Building Association v. Whitney*, 75 Me. 117; *Campbell v. Hampton*, 11 Lea 440. In Georgia this estoppel is recognized by statute, Code (1882), § 2283.

This estoppel is based on the soundest rules of public policy, as remarked in *Anderson v. Darby*, 1 Nott. & McC. 369, by JOHNSON, J., if the rule were otherwise: "No person would be safe in parting with the possession, as he might be driven to the necessity of making out a complete chain before he could evict his tenant, and the law will not permit such a wrong as to suffer a party to avail himself of a possession, thus acquired, to defeat the title of the party with whose permission he went into possession;" and in *Wilson v. Smith*, 5 Yerg. 379, HAYWOOD, J., said: "He [the tenant] has undertaken to preserve the possession of the landlord and to redeliver it, and he cannot do otherwise, without the violation of his plighted faith and without destroying that confidence in promises which is the solid foundation of contracts and of the consequent accommodations flowing from them." In this country the estoppel has not been rested upon the deed or lease, but has been regarded as an incident of the relation of landlord and tenant, *Mattis v. Robinson*, 1 Neb. 3; *Towery v. Henderson*, 60 Tex. 291; and hence it is held that *occupation* by the tenant will estop him from denying his landlord's title, *Coburn v. Palmer*, 8 Cush. 124; *Towne v. Butterfield*, 97 Mass. 105; *Gage v. Campbell*, 131 Mass. 566; and this view has been carried so far as to prevent the tenant from setting up his own

disability; thus in *Wilson v. James*, 79 N. C. 349, the tenant entered into possession of certain land while a slave; having become free, he claimed the right of possession, and suit being brought by the landlord he endeavored to put him to proof of his title, contending that he was not estopped to deny title, because having entered as a slave he was incapable of making a contract. But the Court held that the estoppel applied. It is to be noted that in Louisiana the rule is qualified by the requirement that the tenant's possession shall be undisturbed. See *Pacquetel v. Gauche*, and other Louisiana cases cited *supra*.

Extent of Estoppel. Tenant may not set up the Acquirement of an Outstanding Title.

The estoppel not only prevents the tenant attacking his landlord's title as bad in itself, but also disables him from setting up any outstanding title which the tenant may have subsequently purchased, *Greeno v. Munson*, 9 Verm. 37; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Willison v. Watkin*, 3 Pet. 43; *Hodges v. Shields*, 18 B. Mon. 828; *Moshier v. Reding*, 12 Me. 478; *Ryerson v. Eldred*, 18 Mich. 12; *Norton v. Doe ex d. Sanders*, 1 Dana 14; *Drane v. Gregory's Heirs*, 3 B. Mon. 619; *Russell v. Titus*, 3 Grant 295; or any title which he may have acquired prior to the date of the lease, *Sharpe v. Kelley*, 5 Denio 431; or that the landlord is a trustee for some one holding an adverse paramount title, *Stagg v. Eureka Tanning and Currying Co.*, 56 Mo. 317.

It is to be noted that the courts in Connecticut have not carried the rule to its full extent, for it is there held that a tenant may set up a title acquired by him, whether from the lessor or a third person, after the date of the lease, *Rodgers v. Palmer*, 33 Conn. 155; and in Texas the rule does not apply to vacant lands which are subject to preëmption, *Turner v. Ferguson*, 39 Texas 505.

Tenant cannot set up Title in the State, or a Patent.

The estoppel will prevent the tenant setting up that the title to the land held by him is in the State as against his landlord, *Jackson ex d. Colton v. Harper*, 5 Wend. 246; or that the premises demised were included in another patent than that under which the landlord claims, *Jackson ex d. Bleeker v. Whitford*, 2 Caines 215; and it will prevent a tenant who discovers that his landlord's patent does not cover the whole of the demised land, from obtaining and setting up for himself a patent for the unpatented part, *Trabue v. Ramage*, 80 Ky. 323.

Tenant cannot show Usurious Consideration of Lease.

The estoppel will prevent the lessee from showing that the lease was given for an usurious consideration, *Doe ex d. King v. Murry*, 6 Ired. Law 62.

Tenant cannot set up Personal Disability of Lessor.

It will prevent the lessee from setting up the personal disability of the lessor to make a lease, as in *Prevot v. Lawrence*, 51 N. Y. 219, where a lease having been made by a married woman the lessee was not allowed to set up the coverture, and that the premises were not of the separate estate of the lessor; or that the lessor was a dowress whose dower had not yet been assigned, *Clarke v. Clarke's Adm'r*, 51 Ala. 498; or even a disability of the lessor to own land at all, as on account of alienage, *Ramires v. Kent*, 2 Cal. 558, or slavery, *Helmes v. Stewart*, 26 Mo. 529; or the want of authority of a public official to make a lease of public lands, *Morse v. Roberts*, 2 Cal. 515; or that the officials making the lease had not complied with certain directory provisions ordained by statute to be complied with before leasing, *St. Louis v. Morton*, 6 Mo. 476. The estoppel will prevent a tenant whose land has been sold on execution, and who has taken a lease from the purchaser, from setting up his homestead right during the continuance of the lease, *Abbott v. Cromartie*, 72 N. C. 292.

Estoppel Applies in Case of a Lease by an Agent of an Undisclosed Principal.

That the lessor executes the lease as "agent" without disclosing any principal will not destroy the estoppel, *Bedford v. Kelly*, 61 Pa. St. 491; *Seuffert v. Bean*, 83 Id. 450; and the estoppel has been upheld even where it has been offered to show a revocation of the agent's authority; thus, in *Holt v. Martin*, 51 Pa. St. 499, Martin made a lease of certain premises, in which he was jointly interested with others, describing himself as "agent," but disclosing no principal. He afterwards brought an action to recover possession of the premises. On the trial the defendant offered to show that Martin was the agent of certain persons, who owned eleven twenty-firsts of the premises, and that they had revoked Martin's agency and continued the lease to the defendant. It was held by WOODWARD, C. J., at *nisi prius*, that such evidence was inadmissible, and in delivering the opinion of the Court in banc, AGNEW, J., said: "It was Martin who let the premises to Holt. The relation of landlord and tenant, by the terms of the lease, was exclusively between them. The covenants were those of Martin and

Holt alone, and the sealing and delivering also. Upon any breach of the lessor's covenants the action would be against Martin and no other. Martin simply described himself as 'agent,' no more no less, and it is thought this opened the door to the proof. But agent for whom or for what? . . . His calling himself agent was no admission of title in the persons named in the offer. Thus it was a direct attempt to deny the title of Martin, for, if competent, it showed title in third persons, and brought on directly a conflict upon the title of Martin, and not upon the mere termination of the lease."

Estoppel Applies whether Landlord's Title is Legal or Equitable.

The estoppel applies whether the landlord's title be legal or equitable, *Cooper v. Smith*, 8 Watts 536; and even when the lessor's possession was itself tortious, *Moshier v. Reding*, 12 Me. 478; and see *Trustees of Green v. Robinson*, Wr. (Ohio) 436.

In Favor of whom Estoppel Extends.

The estoppel to deny title extends in favor of the heirs of the original landlord, *Doe ex d. Callender v. Sherman*, 5 Ired. Law. 711; *Blantin v. Whitaker*, 11 Humph. 313; *Symme v. Sanders*, 4 Strobb. 196; or his vendee, *McKune v. Montgomery*, 9 Cal. 575; or the purchaser of his title at a judicial sale, *Thomson v. Peake*, 7 Rich. 353; *Wilson v. Hubbell*, 1 Penny. 413; *Whalin v. White*, 25 N. Y. 462; or his assignee, even though the assignment be in fraud of creditors, *Steen v. Wardsworth*, 17 Vt. 297.

It will apply in favor of a lessee who holds the premises upon an express covenant not to sublet, and who in defiance of the covenant sublets, provided the superior lessor has not taken advantage of the forfeiture, *For-dyce v. Young*, 39 Ark. 135.

But the estoppel is only in favor of the landlord and those having his title, and therefore in an action brought by a stranger the tenant may set up title in himself, *Cole v. Maxfield*, 13 Minn. 235, and where the action is brought by one claiming to have the landlord's title, the fact of the acquirement of the landlord's title by the plaintiff may be disputed by the tenant, *Reay v. Cotter*, 29 Cal. 168; *Tewksbury v. Magraff*, 33 Id. 237; *Wood v. Chambers*, 3 Rich. 150.

Against whom Estoppel Extends.

The estoppel extends to and will affect the assignee of the leasehold interest, *Doe ex d. Lunsford v. Alexander*, 4 Dev. & Bat. Law 40;

Cooper v. Smith, 8 Watts 536; *Earle's Ad'x v. Hale's Adm'r*, 31 Ark. 470; *Stagg v. Eureka Tanning and Currying Co.*, 36 Mo. 317; or one taking possession as successor to the tenant and with his consent, *Tompkins v. Snow*, 63 Barb. 525; to a widow who continues the possession of her husband, *Bufferlow v. Newsom*, 1 Dev. 208; *Doe ex d. Gorham v. Brenon*, 2 Id. 174; or to any one who takes the place of tenant or claims under or through him, *Turley v. Rodgers*, 1 A. K. Mar. 245; *Newman v. Mackin*, 13 S. & M. 383; *Doe ex d. Callender v. Sherman*, 5 Ired. L. 781; *Richardson v. Harvey*, 37 Ga. 224; *Den ex d. Harker v. Gustin*, 7 Hals. 42; *Stahle v. Spohn*, 8 S. & R. 326; *Tilghman v. Little*, 13 Ill. 239; *Jackson v. Davis*, 5 Cow. 123; *Riley v. Million*, 4 J. J. Mar. 395; *Jackson v. Spear*, 7 Wend. 401; *Anderson v. Darby*, 1 N. & McC. 369; *Henley v. Bank*, 16 Ala. 552; *Wood v. Turner*, 7 Humph. 517; *Doty v. Burdick*, 83 Ill. 473; *Hardin v. Forsythe*, 99 Ill. 312; even if he obtains possession through the tenant by purchase, *Doe ex d. Lockwood v. Walker*, 3 McL. 431; *Phillips v. Rothwell*, 4 Bibb 33; *Worthington v. Lee*, 61 Md. 530. It applies to one who holds from the lessee as a mere licensee, *Doe ex d. Kluge v. Lachenour*, 12 Ired. L. 180, and to a sub-tenant who afterwards acquires a perfect title to the premises, *Milhouse v. Patrick*, 6 Rich. (S. C.) 350; *Burnett v. Rich*, 45 Ga. 211; *Scott v. Levy*, 6 Lea 662.

The estoppel extends to an adverse claimant who obtains possession through the tenant, *Stewart v. Roderick*, 4 W. & S. 188; *Bertram v. Cook*, 44 Mich. 396; *Doty v. Burdick*, 83 Ill. 473; or by virtue of a collusive recovery, *Stewart v. Roderick*, and to one who is admitted to defend the action for possession of the land in lieu of the tenant, *Doe ex d. Belfour and Henly's Heirs v. Davis*, 4 Dev. & Bat. L. 300; the rule extending the estoppel to one who comes into possession by collusion with the tenant does not apply where a vendee under articles surrenders his agreement and the owner of a superior title enters, *Cravener v. Bowser*, 4 Pa. St. 259. The tenant cannot have the claimant adverse to his landlord substituted of record as a defendant, *Boyer v. Smith*, 5 Watts 55, or by attornment throw upon the landlord the burden of proof of his title, *Allen v. Chatfield*, 8 Minn. 435, or by a surrender to the adverse claimant produce the same effect, *Swift v. Gage*, 26 Vt. 224.

When the Estoppel Arises.

The estoppel arises whenever the relation of landlord and tenant has been constituted between the plaintiff and defendant; it need not be by a formal lease; see *Moshier v. Reding*, 12 Me. 478; *People ex rel. Ward v. Kelsey*, 38 Barb. 269; *Mattis v. Robinson*, 1 Neb. 3; *Towery v. Henderson*,

60 Tex. 291 ; it is enough that the tenant acknowledge the landlord's title, although in possession of the premises, *Ingraham v. Baldwin*, 9 N. Y. 45, and even standing by at a sheriff's sale and allowing himself to be represented as the defendant's tenant, has been held a sufficient acknowledgment to raise the estoppel, *Covert v. Irwin*, 3 S. & R. 283. If the tenant take a lease from one claiming to be the landlord, *McConnell v. Bowdry's Heirs*, 4 T. B. M. 392 ; *McCreary v. Marston*, 56 Cal. 403 ; or make an agreement with him for possession, *People v. Stiner*, 45 Barb. 56 ; or attorn to him, or make an agreement to pay rent to him, *Baker v. Noll*, 59 Mo. 265, the estoppel will come into effect. In *Dunshee v. Grundy*, 15 Gray 314, the lease was assigned by the lessor, the lessee requested the assignee to permit him to continue on the premises ; this was held a sufficient attornment to give rise to the estoppel ; but in *Stokes v. M'Kibbin*, 13 Pa. St. 267, it was held that an agreement by a tenant on the death of his landlord to pay rent to one claiming to be the guardian of the remaindermen, followed neither by payment of rent nor the execution of a lease, would not estop the tenant from disputing the remaindermen's title ; and in *Patterson v. Sweet*, 13 Brad. 255, an Appellate Court in Illinois held that a parol agreement to pay rent, or even a payment to one who did not give possession of the premises, would not constitute the relation of landlord and tenant so as to raise the estoppel as to title.

The acceptance of a lease, although the lessee is in possession of the premises, creates the estoppel, *Doe ex d. Ball v. Lively*, 1 Dana 60 ; *Bowdish v. City of Dubuque*, 38 Iowa 341 ; *McConnell v. Bowdry's Heirs*, *supra* ; and so the mere acceptance of a lease, although no possession is taken under it, where the lessee is not kept out of possession by a superior title, and could have obtained possession, *Winston v. President and Trustees of Franklin Academy*, 28 Miss. 118 ; *Morse v. Roberts*, 2 Cal. 515 ; *Howard v. Murphy*, 23 Pa. St. 173 ; unless, before taking possession, the lessee expressly disclaims holding of the lessor, and gives him notice thereof, *Nerhooth v. Althouse*, 8 Watts 427 ; but the acceptance of a lease of a small part of a tract of land will not raise an estoppel as to the whole, *Pedrick v. Searle*, 5 S. & R. 236 ; *Brunner v. Bigelow*, 8 Kan. 496 ; the fact that a lease has been made by an unauthorized agent will not destroy the estoppel if the landlord afterwards recognize his act, *Blanton v. Whitaker*, 11 Humph. 313 ; and see *Brahn v. Jersey City Forge Co.*, 38 N. J. Law 74.

But while it is held generally that the manner in which the tenancy is created is immaterial, see *Blanton v. Whitaker*, 11 Humph. 313, it has also been held that the relation which exists must be the conventional one, and that where the tenancy arises merely from the operation of law the estoppel

will not exist, *Vance v. Johnson*, 10 Humph. 214; *Baker v. Hale*, 6 Baxt. 46; *James v. Patterson*, 1 Swan 312.

Tenant may Purchase Outstanding Title, if he does not Set it up.

The estoppel does not prevent the tenant from purchasing any outstanding title, or cause such a purchase to inure to the benefit of the lessor; it merely prevents the tenant from setting up the title during the tenancy, and he may purchase it in order to use it after the expiration of the tenancy, *Williams v. Garrison*, 29 Ga. 503; and see *Corning v. Troy Iron and Nail Manufactory*, 34 Barb. 485; but the tenant must not purchase incumbrances for purposes of speculation; and if he purchase an incumbrance, the presumption will be that he did it to protect his possession, and he will be entitled, as against the landlord, to a credit of the amount paid by him in removing the incumbrance not exceeding the amount due thereon, *Thrall v. Omaha Hotel Co.*, 5 Neb. 295; and see *Scott v. Levy*, 6 Lea 662; and it is held that he may, at least in equity, where he has been obliged, in order to protect his possession, to purchase a mortgage to which his lease is subject, set up the mortgage title against his lessor, and remain in possession until reimbursed, *Bates v. Conrow*, 3 Stockt. 137. The case of *Pierce v. Brown*, 24 Vt. 165, goes further, and holds that where one enters under a mortgagor, and purchases the mortgage, and notifies the landlord that he holds thereunder, he will be allowed to set up the title so acquired, and will not be compelled to surrender possession and bring an ejectment. This case is ably dissented from in *Mattis v. Robinson*, 1 Neb. 3, where the Court confines the right to set up a title acquired under a mortgage to cases in which the tenant has made the purchase in good faith to protect his possession against the mortgagee.

Time during which the Estoppel Lasts.

It has been said that the estoppel lasts only so long as the term granted endures, see *Carpenter v. Thompson*, 3 N. H. 204; *Page v. Kinsman*, 43 Id. 328; but this must be understood as including in the term those prolongations which grow out of the act of the law, as where the tenant holds over, *Jackson ex d. Wills v. Stiles*, 1 Cow. 575; *Hamel v. Lawrence*, 1 A. K. Mar. 330; *Clem v. Wilcox*, 15 Ark. 102; *Longfellow v. Longfellow*, 54 Me. 240; *Stoops v. Devlin*, 16 Mo. 162; *Osgood v. Dewey*, 13 Johns. 240; *Miller v. Lang*, 99 Mass. 13; *Bertram v. Cook*, 44 Mich. 396; but where the possession, after the term has expired, can be explained on other grounds than that of holding over, and which arise out of the contractual relations

of the parties, the estoppel is discharged on the expiration of the lease. Thus in *Shields v. Lozean*, 34 N. J. Law 496, A. executed a mortgage to B., and at the same time leased to B. the mortgaged premises. By the terms of the mortgage the mortgage-money was to be paid on the day the lease expired. It was held that the mortgage being unpaid, when due, that B. could set up his possession thereunder as against A. without surrendering possession, and that although the lease contained an express covenant to surrender at the end of the term.

Surrender generally Necessary to Allow the Tenant to Set up Adverse Title.

As the estoppel to deny the landlord's title depends on the relation of landlord and tenant, and not alone on the deed, it follows that when the relation is terminated the estoppel is at an end, even though the time for which the relation has been contractually established has not yet expired; but such termination cannot be brought about, as a general rule, while the tenant remains in possession of the premises. The rule, therefore, is that where the tenant has acquired a title which he desires to set up against his landlord, or wishes to attack the title of the latter, he must first surrender possession to him, *Greeno v. Munson*, 9 Vt. 37; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Willison v. Watkin*, 3 Pet. 43; *Moshier v. Reding*, 12 Me. 478; *Ryerson v. Eldred*, 18 Mich. 12; *Hodges v. Shields*, 18 B. Mon. 828; *Doe ex d. Newton v. Roe*, 33 Ga. 163; *Brown v. Keller*, 32 Ill. 151; *M'Connell v. Bowdry's Heirs*, 4 T. B. Mon. 392; *Longfellow v. Longfellow*, 54 Me. 240; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Den ex d. Freeman v. Heath*, 13 Ired. L. 498; *Arnold v. Woodward*, 4 Col. 249; *Doty v. Burdick*, 83 Ill. 473; *Rogers v. Boynton*, 57 Ala. 501; *Smart v. Smith*, 2 Dev. 258; *Wilson v. Weatherby*, 1 Nott & M'C. 373; *Smith v. Mundy*, 18 Ala. 182; *Zimmerman v. Marchland*, 23 Ind. 474; *Willson v. Cleaveland*, 30 Cal. 192; *Jackson ex d. Shaw v. Spear*, 7 Wend. 401; *Glen v. Gibson*, 9 Barb. 634; *Williams v. Garrison*, 29 Ga. 503; *Philips's Lessee v. Robertson*, 2 Overt. 399; *Brown v. Keller*, 32 Ill. 152; *Mattis v. Robinson*, 1 Neb. 3; *Hughes v. Watt*, 28 Ark. 153; *Anderson v. Smith*, 63 Ill. 126; *Houston v. Farris*, 71 Ala. 510; *Flanagan v. Pearson*, 61 Tex. 302; *Epslen v. Greer*, 85 Ind. 372; a notice of intention to assert adverse title is not equivalent to a surrender, *Longfellow v. Longfellow*, 61 Me. 590.

Where the tenant has received possession from the landlord, he cannot avoid the necessity of a surrender before attacking the title of his lessor, by acquiring in a representative capacity a title, which if a valid one at all was such at the time the lease was made. Thus in *Houston v. Farris*

et al., 71 Ala. 510, the defendants became tenants by a lease from the plaintiff, who had purchased the demised premises from the sole devisee of one R. S. who died indebted. After the date of the lease, the defendants, who were creditors of R. S., procured letters of administration upon the estate of R. S., and set up a possession as such administrators against their landlord; but the Court, speaking by SOMERVILLE, J., said: "The change in the status of defendants does not change the principle. Their legal metamorphosis from mere tenants to administrators was their own act, and renders none the less necessary their surrender of the possession to the plaintiff before they can in good faith raise the question as to the superiority of their newly acquired title. The policy of the law among other reasons is to discourage tenants from speculating in adverse titles hostile to and in derogation of the title of their landlords."

Surrender must be in Good Faith.

The surrender must be one made in good faith. The tenant cannot put himself in a position to resist his landlord's title by leaving the premises, and then, before his landlord has had a full opportunity of taking possession, returning and possessing himself of the premises, *Den ex d. Freeman v. Heath*, 13 Ired. L. 498. In *Boyer v. Smith*, 3 Watts 449, KENNEDY, J., said: "Now, as between the defendant and his lessor, it cannot be questioned but that the defendant was bound to allow Boyer at least a reasonable time to resume possession before that he himself attempted to retake it, either of his own authority or under that of another." And see *Sanford v. Turner*, 5 J. J. Mar. 104; *Wild's Lessee v. Serpell*, 10 Grat. 408; *Reed v. Shepley*, 6 Vt. 602; *Moshier v. Redding*, 12 Me. 478.

Eviction Equivalent to Surrender.

An eviction will have the same effect on the estoppel as a surrender, *Perkins v. The Governor*, Minor 352; *Wheelock v. Warschauer*, 21 Cal. 309; *Foster v. Morris*, 3 A. K. Mar. 609; *Wells v. Mason*, 5 Ill. 84; *Moffat v. Strong*, 9 Bosw. 57; *Stout v. Merrill*, 35 Iowa 47; *Marsh v. Butterfield*, 4 Mich. 575.

Disclaimer, Effect of.

A disclaimer will not have the effect of a surrender, for it is not in the power of the tenant, by simply disclaiming to hold of the landlord, to change the relation which he has himself established, *Duke v. Harper*, 6 Yerg.

280; *Wilson v. Smith*, 5 Id. 379; *Flanagan v. Pearson*, 61 Tex. 302; *Whiting v. Edmunds*, 94 N. Y. 309; although by disclaiming the tenant renders himself liable to be regarded by his landlord as a trespasser and his possession as tortious, *Willison v. Watkins*, 3 Pet. 43; and see *Walden v. Bodley*, 14 Pet. 156; *Thayer v. Waples*, 26 La. Ann. 502; *Steinhauser v. Kuhn*, 50 Mich. 367. A distinct disclaimer by one who has executed a lease, made and brought to the notice of the landlord before possession is taken thereunder, would in principle be an exception to rule above stated, for in that case the lease would be repudiated, the possession of the disclaimant would not be thereunder, and the relation of landlord and tenant not existing there could be no estoppel.

The greatest benefit which can be derived by a tenant from a disclaimer is that, if notice thereof is brought home to the landlord, it will be regarded as originating a possession which, by force of the Statute of Limitations, may become a valid one against the landlord, *Williams v. Cush*, 27 Ga. 507; *Shelton v. Eslava*, 6 Ala. 230; the statute beginning to run from the time of the receipt of notice by the landlord, *Patterson v. Hansel*, 4 Bush. 634; *North v. Barnum*, 10 Vt. 223; *Greeno v. Munson*, 9 Id. 37; for under a lease the tenant cannot originate an adverse possession, or continue one previously commenced, on account of the privity of possession between landlord and tenant, *M'Ginnis v. Porter*, 20 Pa. St. 80; *Cornung v. Troy Iron and Nail Works*, 34 Barb. 485; and privity having been once established it is presumed to continue until destroyed by an unequivocal act, amounting to a disclaimer, and brought to the notice of the landlord, *Stacy v. Bostwick*, 48 Vt. 192; *Brandon v. Bannon*, 38 Pa. St. 63; *Cadwalader v. App*, 3 W. N. C. 1; *Flanagan v. Pearson*, 61 Tex. 302.

Tenant may Show Expiration of Landlord's Title.

The estoppel has reference to the title of the landlord existing at the time the tenant entered, or at the time he attorned or acknowledged title in the landlord; it is against this title the tenant is forbidden to set up another; he may, therefore, without any violation of the rule, show that since the relation of landlord and tenant began the landlord's title has expired, been defeated, or extinguished, *Jackson ex d. Russell v. Rowland*, 6 Wend. 666; *Swann v. Wilson*, 1 A. K. Mar. 99; *Longfellow v. Longfellow*, 54 Me. 240; *Bettison v. Budd*, 17 Ark. 546; *Kinney v. Doe ex d. Laman*, 8 Blackf. 350; *Giles v. Ebsworth*, 10 Md. 333; *Wells v. Mason*, 5 Ill. 84; *Tilghman v. Little*, 13 Id. 239; *Den ex d. Howell v. Ashmore*, 2 Zab. 261; *Wheelock v. Warschauer*, 21 Cal. 309; *Lessee of Devacht v. Newsam*, 3 Oh. 57; *Larrence v. Miller*, 1 Sandf. 516; *Prestman v. Siljacks*, 52 Md. 647; *Elms v.*

Randall, 2 Dana 100; *St. John v. Quitzow*, 72 Ill. 334; *Hardin v. Forsythe*, 99 Id. 312; *Stewart v. Roderick*, 4 W. & S. 188; *Foster v. Morris*, 3 A. K. Mar. 609; *Wild's Lessee v. Serpell*, 10 Grat. 415; *Grundin v. Carter*, 99 Mass. 15; *Smith v. Shephard*, 15 Pick. 147; *Welch v. Adams*, 1 Met. 494; *Newel v. Wright*, 3 Mass. 156; *Duff v. Wilson*, 69 Pa. St. 316; *Pierce v. Brown*, 24 Vt. 165; *Houston v. Farris*, 71 Ala. 510; or that the landlord has assigned his interest in the lease, *Binney v. Chapman*, 5 Pick. 124, or has conveyed his reversion, Id.; *Ryerss v. Farwell*, 9 Barb. 615; *Hoag v. Hoag*, 35 N. Y. 469; *Longfellow v. Longfellow*, *supra*; *Gregory's Heirs v. Crab's Heirs*, 2 B. Mon. 234, in which last case ROBERTSON, C. J., said, "This is not turning against the title under which the entry was made, but it is following and upholding that title wherever the landlord may have chosen to lodge it;" but merely producing a witness who swears that the landlord told him he had assigned the title will not be sufficient evidence of such an assignment, *Horner v. Leeds*, 1 Dutch. 106.

Following out this doctrine, where the action is by the landlord's heirs, the tenant may show that the estate of the landlord was for life only, and that the landlord died before the action was brought, *Hackart v. M'Kee*, 5 Watts 385.

The tenant may show that he has become the purchaser of the landlord's title at a sheriff's sale, upon execution against the landlord, *Elliott v. Smith*, 23 Pa. St. 131; *Casey v. Gregory*, 13 B. Mon. 505; *Randolph v. Carlton*, 8 Ala. 606; *Tilghman v. Little*, 13 Ill. 239; *Jackson ex d. Van Schaick v. Davis*, 5 Cow. 123; *Nellis v. Lathrop*, 22 Wend. 121; or that the landlord's title has been divested by a sheriff's sale, *Lancashire v. Mason*, 75 N. C. 455; and he may show this where the sale which has divested the landlord's title has taken place under proceedings to enforce a lien which existed at the inception of the landlord's title, and although the proceedings were not taken against the landlord as a defendant; for in such case the landlord's title is divested as fully as in the case of a sale upon a judgment against him personally, and it is this divestiture, the divestiture of the very title which the tenant has acknowledged, which he is permitted to set up against the landlord, *Smith v. Crosland* (Supreme Court of Pennsylvania), 18 Reporter 665; and see *Carson v. Crigler*, 9 Bradw. 83. The tenant may show that the landlord's title has been transferred by a partition sale under a decree, *Wolf v. Johnson*, 30 Miss. 513, although the decree was not *in invitum*, *Pentz v. Kuester*, 41 Mo. 447. In *Swift v. Dean*, 11 Vt. 323, where a plaintiff made a levy, and the tenant in possession acknowledged title to be in the plaintiff, and the levy afterwards proved void, it was held the tenant could show this as a defence.

The tenant may show that he has purchased the landlord's title at a tax

sale, *Bettison v. Budd*, 17 Ark. 546; *Higgins v. Turner*, 61 Mo. 249; but not where, by the terms of the lease, the tenant is obliged to pay the taxes; for to allow him to neglect paying them, and then to buy in the property at the sale for the non-payment, would be to permit him to take advantage of his own wrong, *Haskell v. Putnam*, 42 Me. 244; *Carithers v. Weaver*, 7 Kan. 110. In *Duffitt v. Tuhan*, 28 Kan. 292, the tenant entered on premises by the assent of the landowner, nothing being said about either rent or taxes; it was held that the tenant could not set up against the landlord a title purchased at the tax sale, since under the circumstances the landlord had a right to presume that the possession would be protected by the tenant.

Where the sale for taxes ante-dates the lease the purchase at such sale cannot be set up, *Sharpe v. Kelley*, 5 Denio 431.

Tenant may, without Waiting for Actual Eviction, Attorn to one who has Recovered against Landlord's Title.

Where a recovery has been had against the landlord's title by a third person, the tenant may, without waiting for an actual eviction by the successful claimant, attorn to him and take refuge under the superior title, and set it up against his landlord, for as the tenant owes allegiance to his landlord so the landlord owes protection to his tenant, *Mason v. Bascom*, 3 B. Mon. 269; *Hodges v. Shields*, 18 Id. 828; *Lunsford v. Turner*, 5 J. J. Mar. 104; *Clapp v. Coble*, 1 Dev. & Bat. Eq. 177; *Den ex d. Marsh*, 9 Ired. Law 234 [but see *Den ex d. Grandy v. Bailey*, 13 Id. 221]; *Mase v. Goddard*, 13 Metc. 177; *George v. Putney*, 4 Cush. 351; *Casey v. Gregory*, 13 B. Mon. 505; *Foss v. Van Driele*, 47 Mich. 201; if the lease is made and possession obtained by the tenant after the date of the judgment, the estoppel will prevent the setting up of the superior title, *Mason v. Bascom*, *supra*; and the mere fact that a superior lien and mortgage exist, which, by being enforced, may divest the title of the landlord, will not justify the tenant in attorning to the owner of the lien before its enforcement against the property, *German Central Building Association v. Rosenbaum*, 2 Cin. Sup. Ct. 69; and the tenant cannot attorn even to the owner of a superior title who does not enforce it, *Lowe v. Emerson*, 48 Ill. 160.

Rule as to Estoppel where Tenant has not gone into Possession under the Landlord.

Where the tenant has not gone into possession of the premises under the landlord, but has simply acknowledged his title, or taken a lease from him

while himself in possession, the estoppel is much less rigorously enforced, for, while it applies in cases of attornment, yet, as the landlord can be put in *statu quo* without a surrender of the premises, this circumstance gives rise to an exception to the rule, and a tenant whose attornment has been procured, or who has been induced to execute a lease, by the fraud of the landlord, may set up that fact, and, having established it, is at liberty to controvert his lessor's title, as said by BLACK, C. J., in *Thayer v. Society of United Brethren*, 20 Pa. St. 60: "Where a lessee, at the time the lease is executed, is not the occupant of the land leased, and he goes into possession under and in pursuance of the lease, he cannot afterwards claim title to the land without first surrendering possession to the lessor. . . . But if the lessee was in possession at the time the lease was executed, he may, under certain circumstances, be permitted to prove that the land is his own, and thus resist the proceedings to turn him out. This is allowed because the landlord, if he fails, is not in a worse condition than he was before the lease;" and in *Gleim v. Rise*, 6 Watts 44, HUSTON, J., said: "The case is different when a man comes to one in possession of property and represents himself as the owner, though in truth he has no right to either the property or the possession, and under such representation obtains an agreement to pay rent (or even a written lease, *Hall v. Benner*, 1 P. & W. 402). The person in possession is not estopped from showing that the pretended lessor has no title. The distinction is between a case where a lessor was in possession and a lessee obtained possession under him, and a case where the person in possession did not obtain it from him who, under some false pretence, obtained the position of lessor. In the first case the lessee cannot object to the title of him who put him into possession; in the latter he will be admitted to prove the imposition; if he does prove it he is not bound to give up possession, nor is he liable for use and occupation."

Notwithstanding the remarks of the Court in *Isaac and Wife's Lessee v. Clarke*, 2 Gill 1, to the effect that the exceptions to the rule "do not rest on the fact that the acknowledgment was made by the tenant subsequent to his coming into possession, or that he was originally possessed under another title," and the case of *Gallagher v. Bennett's Heirs*, 38 Tex. 291, in which it does not appear that the tenant's possession was prior to the lease, it is thought that the true reason for the relaxation of the rule of estoppel is to be found in the distinction taken by Chief-Justice BLACK and Mr. Justice HUSTON, *supra*.

In the following cases the estoppel has been held not to apply where the lease or attornment had been procured by the fraud or misrepresentation of the landlord, *Tison v. Fawn*, 15 Ga. 491; *Cramer v. Carlisle Bank*, 2 Grant 267; *Brown v. Dysinger*, 1 Rawle 408; *Gleim v. Rise*, 6 Watts

44; *Higgins v. Turner*, 61 Mo. 249; *Smith v. McCurdy*, 3 Phila. 488; *Alderson v. Miller*, 15 Gratt. 279; *Jenckes v. Cook*, 9 R. I. 520; *Wiggin v. Wiggin*, 58 N. H. 238; and in some cases it is held that a clear mistake of fact, so that the tenant in possession attorns without an actual or constructive knowledge of his rights, will remove the estoppel from the tenant, *Givens v. Mullinax*, 4 Rich. (S. C.) 590; *McDevitt v. Sullivan*, 8 Cal. 592; *Schultz v. Elliott*, 11 Humph. 183; an illustration of this exception to the rule is to be found in *Anderson v. Smith*, 63 Ill. 126. Here B. was in possession of certain land as tenant to W. A. bought B.'s possession and entered; one S. claimed the land, and A. attorned to him and paid rent. W. afterwards claimed rent and brought ejectment for the land; A. defended the action at S.'s request and was evicted. S. brought an action against A. for rent which had accrued during his possession. It was held that A. could defend by showing the true state of the title. Though the opinion of the Court may leave it a little doubtful as to whether it went on the ground of misapprehension alone, or of misapprehension combined with fraud on the part of the second landlord, still the Court said: "A person entering under one landlord and then attorning to another, under the belief that the latter has the title and should receive the rent, must certainly be permitted to show that such belief was founded on a misapprehension of the facts, and that the title claimed by the second landlord has been adjudged to be in the first."

In *Ross v. Kernan*, 38 N. Y. S. C. 164, the defendant was tenant of one B. M. Stillwell, and, during the pendency of the lease, a warrant to obtain possession was issued in favor of Ross, the plaintiff, who had purchased the premises under legal proceedings; the defendant thereupon took a lease from Ross. Subsequently, and before the lease had expired, the judgment under which the sale had taken place was reversed, and the defendant attorned to Stillwell. In an action by Ross against the defendant, it was held that the estoppel in favor of Stillwell was revived by the reversal of the judgment, and that the tenant was not estopped to show that the title to the premises was in Stillwell and not in Ross.

As to what will constitute sufficient fraud to defeat the estoppel the authorities are not unanimous. In *Hockenbury v. Snyder*, 2 W. & S. 240, it was intimated that when one not in possession, and who has no title, procures the execution of a lease by the tenant it would require very slight proof of fraud to induce the Court to admit evidence of the true condition of affairs. To the same effect is *Hall v. Benner*, 1 P. & W. 403; and in *Baskin v. Seechrist*, 6 Pa. St. 154, BELL, J., in delivering the opinion of the Court, holding that it mattered not whether the deception originated in voluntary falsehood or in simple mistake, said: "For the immunity it

confers springs not so much from the fraud of the usurper as from the wrong which the deception would otherwise work upon the rights of the lessee, though questionless the presence of moral turpitude will tend to hasten a conclusion which without it may sometimes halt and hesitate." In *Hall v. Benner*, *supra*, A. owned premises subject to a mortgage. They were sold under a *levari facias* to B., who, before the return of the writ, represented to A. that he (B.) had a right to immediate possession, and, refusing him time to consult counsel, induced A. to become tenant to him. It was held that the estoppel was released. In *Miller v. McBrier*, 14 S. & R. 382, the defendant had been in possession of land for some years, and had made improvements, when the plaintiff came to him, claimed the land, and exhibited a patent, dated December 19, 1814, which was based on an application of one J. S. in 1769, and recited a deed from J. S. to the plaintiff, dated October 18, 1814; the defendant thereupon made an agreement with the plaintiff for the possession of the land. On the trial the defendant offered to show that in 1769 J. S. was so old that his death prior to the alleged accrual of the plaintiff's title might be presumed, and, on this being objected to, offered to show that J. S. was dead at least as early as 1796, that the plaintiff had had a deed for the land drawn and executed to him by a person who was not the owner thereof, and upon this deed obtained his patent. All this evidence was rejected, and the rejection being assigned for error in the Supreme Court, GIBSON, J., in delivering the opinion of the Court, said: "A tenant may impeach his landlord's title whenever he can show that he was induced to accept of the lease by misrepresentation and fraud; and the exhibition of a title founded in forgery, to induce a person already in possession to accept of a lease, is an act whose character is too unequivocal to be doubted." It may be noted in passing that in the same case the Court held that where a plaintiff in ejectment claims, both by virtue of an original title and as lessor, the defendant will be permitted to meet him on both grounds. And see *Jochim v. Tibbells* (Supreme Court of Michigan), 15 Reporter 306.

In *Thayer v. Society of United Brethren*, 20 Pa. St. 60, BLACK, C. J., stated the rule as follows: "He [the tenant] will be able to avoid the lease by proof of such facts as would entitle him to relief in equity from any other obligation created by deed." While thus giving what seems to be a sufficiently liberal rule, the Court said: "The mere fact the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise would be to say that the tenant shall not set up title in himself when he has none, and that the lease

shall be no evidence of the landlord's rights except when he can prove them without it."

The general rule seems to be that, no matter how slight evidence of fraud or mistake may be held by a Court to free the question of title from estoppel, yet there must be something more than a mere untrue assertion of title on the part of the lessor; see in addition to cases *supra*, *Miller v. Bonsadou*, 9 Ala. 317; *Lyon v. Washburn*, 3 Col. 201; and it must also appear that the fraud of the landlord has actually induced the attornment of the tenant, and this is a question for the jury, *Evans v. Bidwell*, 76 Pa. St. 497. The Supreme Court of California has, however, gone very much farther, and has practically held that whenever the tenant has not received possession from the lessor, he will not be estopped by his lease; in other words, that a mere claim of title, if not well founded, is a sufficient fraud to set the matter at large. It was so held in *Tewksbury v. Magraff*, 33 Cal. 237. This question again came up in *Franklin v. Merida*, 35 Id. 558, and the Court adhered to its former decision, SANDERSON, J., in the course of an elaborate opinion, saying: "Having thus obtained no advantage over A. [the lessor] by the transaction, why should B. [the lessee] be estopped from showing precisely what he would have been permitted to show had the transaction never occurred? If A. is thus in no worse plight than he was before the transaction, upon what principle in law or ethics can the truth be kept back? If B. has promised to pay the rent or hold possession for A., he having no title, where is the consideration for B.'s promise? Suppose the title is in C.; B. is then legally bound to pay the value of the use and occupation to C., and surrender to C., notwithstanding the lease from A. If, then, he cannot be allowed to dispute A.'s title, B. can legally be made to pay rent to A., and the value of the use and occupation to C. The doctrine of estoppel between landlord and tenant was never designed to work such a result. It may be said that the taking of the lease by B. is a misrepresentation of his own relation to the land, and calculated to lull A. into security, and induce him to neglect the prosecution of his rights in some possible way. If so, by parity of reason, the giving a lease is a misrepresentation by A. as to the title, tending directly to the prejudice of B., and if the account of the latter is to be charged with misrepresentation in receiving, the account of the former must, by parity of reason, be charged with misrepresentation in giving the lease, which so far results in a balance, and still leaves the parties upon equal terms, which is the principal object of an estoppel. . . . In all cases where a party, if out of possession, seeks a taking and holding under himself by another in possession, from the very nature of the case there must be a representation by him that he is the owner. The bare proposition to lease involves such a repre-

sentation, and if he be not the owner, the representation is false. If, under such circumstances, a party in possession take a lease, his act can be accounted for upon no rational theory except that he was influenced by an express or implied representation. When, therefore, in the opinions of the judges, such expressions are used, their sense is fully satisfied by the intrinsic probability that there were unfair means employed, or there was some mistake whereby the tenant was induced to act, and, in our judgment, such intrinsic probability not only justifies, but requires, the Court to look behind the lease and unearth the truth." From this decision SAWYER, C. J., dissented, as he had previously done in *Tewksbury v. Magraff*. This decision, if carried to its legitimate conclusion, would enable the tenant to put the landlord to the proof of his title whenever he had not delivered the possession; but the Supreme Court of California has stopped short of this result, and has held that while the tenant, under such circumstances, may dispute the landlord's title, yet the mere production of the lease would make a *prima facie* case for the landlord, which the tenant must overcome by showing a paramount title in himself, or judgment must be given for the landlord, *Peralta v. Ginocchio*, 47 Cal. 459. And see on the general rule in California *Johnson v. Chely*, 43 Cal. 305; *Lataillade v. Santa Barbara Gas Co.*, *Ibid.* 4.

In *Lyon v. Washburn*, 3 Col. 201, the California cases of *Tewksbury v. Magraff* and *Franklin v. Merida* were cited and pressed upon the Court, which expressly repudiated them as authority, WELLS, J., in commenting upon the opinions in them, saying: "The argument omits from consideration the circumstance that every letting and every acceptance of an attornment involves an implied if not an express undertaking that the tenant shall peaceably enjoy the premises as against the landlord; that is to say, that proceedings for the assertion of the hostile title shall not be instituted. . . . If the hostile title be not the superior one, it is the tenant's own folly to yield to an empty claim; but if he do so, and thus induces a forbearance of litigation, it may be until the Statute of Limitations has completed its course, no principle can be invoked which shall permit him to recede from what he has solemnly undertaken." We are aware of no State except California in which the rule of *Tewksbury v. Magraff* has been adopted.

A fraud perpetrated by the landlord upon a third person, and not upon the tenant himself, will not defeat the effect of the estoppel, *Smith v. M'Curdy*, 3 Phila. 488.

In Alabama a misapprehension of law has been allowed to do away with the estoppel, *Cain v. Gimon*, 36 Ala. 168; and see *Doe ex d. Shelton v. Carrol*, 16 Id. 148; but it is thought that such would not generally be held

to be good law, in view of the presumption that the law is known by all.

In Demise of a Franchise, the Principle of Estoppel held not to Apply.

Where the subject of demise is a franchise, fraud has been allowed to release the estoppel, even where the tenant apparently received possession or its equivalent from the lessor. Thus in *Milton v. Haden*, 32 Ala. 30, the plaintiff made a lease of a public ferry to the defendant, but no legislative grant of the ferry right could be found. In an action on a note given for rent by the defendant, it was contended by the plaintiff that the defendant having gone into possession under the lease, he was estopped from setting up the plaintiff's want of right. STONE, J., said: "The principle does not apply in this case. We have shown above that a public ferry is a franchise, and that from the year 1820 to the present day its exercise without license, or legislative grant, has all the time been prohibited, under a penalty. To allow the principle to govern a case like the present would be to sacrifice a sound legislative policy to the presumed allegiance which a tenant owes to his landlord." And, after citing *Satterlee v. Matthewson*, 13 S. & R. 133, and the remarks of GIBSON, J., in *Miller v. M'Brier*, 14 Id. 382, the learned judge continued: "In the present case Mrs. Tanner, by leasing the ferry to Mr. Milton, impliedly, if not expressly, represented that she was the owner of the franchises, and it is impossible to resist the conclusion that Milton would not have accepted the lease if he had known the title to be invalid; see *Lanier v. Hill*, 25 Ala. 554. We hold that one who usurps the right of a public ferry in violation of our statutes cannot claim the allegiance from his lessee which is due from a tenant to his landlord. There is in this case another clear ground on which to base our decision—one who usurps a franchise and makes contracts based upon it cannot enforce such contracts in the courts of the country."

Estoppel where Tenant has Acknowledged Two Landlords.

A curious question may arise when one placed in possession by another attorns to a third person, without the original landlord's consent, and the third person brings his action. Will then it be his duty, on account of the allegiance due his first landlord, to set up his title, or is he estopped from so doing by the attornment to the second landlord? In *Blynn v. Beeson*, 1 Douglass 179, it was held that the estoppel would not apply, and that it was the tenant's duty to set up the original title. But it has been held that

by accepting two leases for the same premises for the same term the tenant may estop himself as against both lessors, *Patterson v. Sweet*, 13 Bradw. 255; and see *Bailey v. Moore*, 21 Ill. 165; *Carter v. Marshall*, 72 Id. 609.

Estoppel where Lessor is Estopped as Tenant to Third Person.

It is also held that the estoppel will not prevent the lessee from setting up that the lessor is tenant to a third person, whose title he is attacking. Thus in *Elms v. Randall*, 2 Dana 100, it was held that where A. leased to C., C. could show that A. was possessed as tenant of B., and had set up an independent possession against him, and could claim to hold under B., for A. could no more deny the title of his landlord than could C.; and see also *Howard v. Terry*, 4 Sneed 419.

Estoppel in Case of Lease with Joint Lessors.

A tenant under a lease made by several lessors jointly cannot inquire into their individual interests so long as he remains in possession, *Hecht v. Ferris*, 45 Mich. 376.

Estoppel may be Guarded against by Covenants.

The estoppel may be guarded against by covenants in the lease, *Lessee of Mayor of Philadelphia v. The Permanent Bridge Company*, 4 Binn. 283; or it may be waived by the landlord; thus where one claiming as landlord, by virtue of a sheriff's sale, took from the tenant a note for the rent, and told him that he would not claim rent if not entitled to it, it was held that the tenant could show an outstanding superior title, *Wood v. Chambers*, 3 Rich. 150; and if the landlord lies by and permits a sale of the property, he will not be permitted to invoke the estoppel against an innocent purchaser for value who buys from one who apparently holds title, *Thompson v. Clark*, 7 Pa. St. 62.

In North Carolina held that Tenant may show an Equitable Title as against his Landlord—Limitation of this Position.

In *Turner v. Lowe*, 66 N. C. 413, the Court, while admitting the general rule of estoppel, held that a tenant might show an equitable title, or facts which render it inequitable on the part of the landlord to turn him out.

The effect of this decision has been subsequently explained by a decision of the same court. In *Hahn v. Guilford*, 87 N. C. 172, RUFFIN, J., in delivering the opinion of the court, said, after citing *Turner v. Lowe*, *supra*, and *Parker v. Allen*, 84 N. C. 466, "It is not, therefore, every equitable title

that will serve to defeat the estoppel, but only such as arise out of the relations of the character indicated, that is to say, such as a court of equity, under our former system, would protect, even after judgment in a court of law. If a perfect legal title purchased from a stranger could not prevail over the estoppel, surely it cannot be supposed that an equitable title so acquired could do so."

Assignability of Term—Subletting.

In the absence of any clause in the lease restraining the tenant from so doing, the tenant for years has the right to assign his term or to sublet the demised premises, *Indianapolis Manufacturers' and Carpenters' Union v. The Cleveland, C. & T. Railway Co.*, 45 Ind. 281; *Crommelin v. Thiess*, 31 Ala. 412; *Cooney v. Hayes*, 40 Vt. 478; *Gould v. Sub-District No. 3*, 8 Minn. 427; *Clark v. Herring*, 43 Ga. 226; and this although the word assigns does not appear in the lease, *Esty v. Baker*, 48 Me. 495. Some decisions have qualified this right, by limiting it to cases in which the assignment or subletting is for a use not out of accord with the character of the demised premises, *Parkman's Adm'r v. Aicardi*, 34 Ala. 393; *Nave v. Berry*, 22 Id. 390; and for a purpose not inconsistent with the lease itself, *Crommelin v. Thiess*, 31 Ala. 412. And this limitation, though we do not find it laid down except in the cases mentioned, seems to be founded in reason, and would probably be sustained by any court under whose consideration it might fall; for if the power of the tenant himself is limited, as to the use to which the demised premises shall be put, by the contract of letting, either by an express clause in the lease or by the circumstances with reference to which both parties contracted, it would seem preposterous to enable him to destroy the limitation by making an assignment, or to give the assignee a power which was not his own to convey; and it cannot be said that the assignee stands in the position of an innocent purchaser without notice of the limitation, and that his ignorance thereof is due to the neglect of the lessor to give him notice, for the notice is to be found according to the terms of the qualification, either in the openly apparent character of the premises, or in the lease itself, without the exhibition of which it would be folly for any one to take an assignment of a term.

A lessee may convey his term without the joinder of his wife in the conveyance, *Sharp v. Allen*, 46 Mo. 319.

Statutory Restriction of Right of Assignment.

In some States the tenant has not the power of assignment or subletting. Thus in Georgia in cases where the tenant is declared to have the usu-

fruct only of the land, Code (1882), § 2279, he is prohibited assigning or subletting without the consent of his landlord, *M'Birney v. M'Intyre*, 38 Ga. 261; *Sealey v. Kittner*, 41 Id. 594; but it is otherwise where the tenant has an estate for years within the meaning of the Code, *Clark v. Henry*, 43 Ga. 226. In Kansas there is a statutory prohibition against assigning or subletting, Comp. Laws (1879), § 3003, p. 521, and in Kentucky an assignment by a tenant for a term of two years or less works a forfeiture, Gen. Stat. (Bullitt & Feland 1881,) Ch. 66, Art. I., § 1, p. 600; and so in Missouri, 1 Rev. Stat. (1879,) § 3075, p. 514; but an assignment of a part less than two years of a term greater than two years has been held in Kentucky not to work a forfeiture, *Phelps v. Nave*, 5 Ky. Law Rep. 932. As an instrument of a part of a term is really a subletting, it is thought that this decision is sustainable on that ground as well as on the narrower one that a term less two years has not been assigned. In Texas the tenant may not "rent or lease" the demised premises without the lessor's assent, Rev. St. (1879), Art. 3122, p. 452.

Clauses in Lease prohibiting Subletting or Assignment.

In consequence of the existence of the right of assignment and subletting, and of the possible inconvenience which its exercise might cause to the landlord, it is customary to introduce into leases clauses forbidding such assignment or subletting without the consent of the landlord; and this renders it necessary to distinguish between an assignment and a subletting, for the law, which is jealous of any restrictions being placed upon estates, either as to their use or alienation, other than those which she herself imposes, construes such a clause strictly, and it may be stated, generally, that the law in this country is that a prohibition to assign will not forbid a subletting, or a prohibition to sublet an assignment, and that a covenant not to do the one will not be violated by doing the other, *Collins v. Hasbrouck*, 56 N. Y. 157; *Jackson ex d. Stevens v. Silvernail*, 15 Johns. 278; *Jackson ex d. Weldon v. Harrison*, 17 Id. 66; *Field v. Mills*, 33 N. J. Law 254; *Lynde v. Hough*, 27 Barb. 415; *Hargrave v. King*, 5 Ired. Eq. 430. As to one part of this statement there seems to have been no dispute, viz., that a covenant not to assign is not violated by a subletting, but in *Greenaway v. Adams*, 12 Ves. 395, Sir WILLIAM GRANT, M. R., held that a covenant not to sublet (in that case expressed by the words, "let, set, demise the premises or any part of them for all or any part of the term,") was violated by an assignment, and this opinion was spoken of approvingly by the Supreme Court of New Jersey in *Den ex d. Bockouwer v. Post*, 1 Dutch. 291; the point, however, was only incidentally involved in the case before the Court, which in

its opinion stated the law to be that a covenant not to assign was not violated by a subletting, and in a subsequent case, in which the question directly arose, *Field v. Mills*, 33 N. J. Law 254, the same Court expressly disapproved of *Greenaway v. Adams*; and see *Troxell v. Wheatly*, 2 Luz. Leg. Reg. 37.

Mr. Taylor, in his work on Landlord and Tenant, § 403, note 2, appears to sustain *Greenaway v. Adams*, *supra*, on the ground that the word "set" was employed, but the opinion of Sir WILLIAM GRANT went rather upon the nature of an assignment and of a subletting than upon the particular phraseology of the covenant before him. The words of his Honor were: "I have no doubt upon the construction of this covenant. This case is not like *Crusoe v. Bugby* [2 Black. 766, 3 Wils. 334], where all the words of the covenant could have distinct effect and operation without referring at all to an under lease, and it did not follow that because the lessor did not choose that the tenant should assign therefore he intended to restrain underletting. But, on the other hand, it would be very strange if the landlord meant to restrain underletting that he should not mean to forbid the tenant to part with the whole interest. Clearly, both according to the letter and spirit, the covenant did restrain assignment without license." And it is also to be noted that in *Horner v. Den ex d. Leeds*, 1 Dutch. 106, PORTS, J., states that "set" is a good word of leasing, and apparently considers it equivalent to demise.

With regard to the clause under consideration in *Greenaway v. Adams*, there can, we think, be but little doubt that its terms were properly held to prohibit an assignment, for a letting of the whole term which was covenanted against undoubtedly is a mere assignment differently expressed; but Sir WILLIAM GRANT'S assumption that an intention to restrain subletting would include an intention to prohibit assignment, is unsupported by authority in this country, and can hardly be said to be well founded in reason, when we consider the different relations borne by an assignee and by a subtenant to the original lessor. The want of privity between the subtenant and the lessor would prevent the latter from having any remedy against him on the covenants in the lease, while the assignee would be bound by all covenants running with the land, and the landlord might have a remedy for breach of such covenants against him at the same time that he held his lessee responsible upon his express covenant.

Distinction between Assignment and Subletting.

An assignment takes place where the whole extant interest of the tenant is conveyed by him to a third person, so as to vest his entire rights in the

assignee, *Indianapolis Manufacturers' and Carpenters' Union v. The Cleveland, C. & I. R. W. Co.*, 45 Ind. 251; *Bedford v. Terhune*, 30 N. Y. 453; the form of assignment is not essential. In *Indianapolis Manufacturers' and Carpenters' Union v. The Cleveland, C. & I. R. W. Co.*, *supra*, an agreement by a lessee with a third person that the latter should have the right to use and possess the realty so long as the lessee could, was held an assignment within the terms of a prohibition; and an assignment of a term created by a lease under seal by a writing not under seal, followed by entry on the part of the assignee, has been held a valid assignment, *Sanders v. Partridge*, 108 Mass. 556.

To constitute an assignment, the conveyance must be for the whole of the term, *Wheeler v. Hill*, 16 Me. 329; and of the whole of the tenant's right, *Bagley v. Freeman*, 1 Hilt. 196; *Kain v. Hoxie*, 2 Id. 311. In *Post v. Kearney*, 2 Comst. 394, where the tenant leased the premises for the whole of his unexpired term, with a covenant on the part of his lessee that he would surrender them on the last day of the term, it was held that the transaction was a subletting, and not an assignment; and see *Linden v. Hepburn*, 3 Sandf. 668.

Effect of Reservation of Rent in a Transfer of the Whole Term.

If any right in or to the premises remains in the tenant, the transaction is a subletting; and it has been held, if he reserve a rent different from that paid by him, although he "assign" the whole term, the transaction will be regarded as a subletting, *Collins v. Hasbrouck*, 56 N. Y. 157; *Collamer v. Kelley*, 12 Iowa 319; *Martin v. O'Connor*, 43 Barb. 514. These cases would seem to modify the position taken in *Bedford v. Terhune*, 30 N. Y. 453, that a subletting must necessarily be for a portion of the tenant's term only; but in *Lloyd v. Cozzens*, 2 Ashm. 131, President Judge KING held that where the whole term was made over, although rent and right of entry were reserved to the original lessee, the case was that of an assignment and not of an underlease.

In *Woodhull v. Rosenthal*, 61 N. Y. 382, the position in *Bedford v. Terhune* was approved, and the case of *Post v. Kearney*, *supra*, questioned by the Commission of Appeals. DWIGHT, Com., said: "It is true that *Martin v. O'Connor* (43 Barb. 522) holds that though the lessee transfer his entire interest, if he takes a covenant from the transferee to surrender up the possession to him at the expiration of the term, and reserves a right of reentry in case the rent is not paid, the transaction is a sublease and not an assignment. This case is rested upon *Post v. Kearney*, 2 N. Y. 394. That case goes upon the ground that there was an express clause in the lease

providing for the surrender by the derivative lessee to the lessee. It was considered, so far as I can understand the case, that this created a sort of reversion in the lessee, and made the transaction an underlease. It is certainly difficult to reconcile *Post v. Kearney* and *Martin v. O'Connor* with *Bedford v. Terhune*. . . . The rule is stated in very clear terms in Bacon's Abridgment: 'Where the whole term is made over by the lessee, although in the deed by which that is done the rent and power of entry for non-payment of rent are reserved to him and not to the original lessor, this is an assignment and not an underlease and this although new covenants are introduced in the assignment.'—*Bac. Abr. Leases*, I., 3. The case at bar resembles this statement in Bacon. There was an agreement by Hospool to surrender at the end of his term, but no specific agreement to surrender to the lessee (Kelly). The case does not, therefore, fall within the precise ruling of *Post v. Kearney*. The doctrine of that case is not to be extended, the theory in *Bedford v. Terhune* being more in accordance with principal and authority."

In *Adams v. Beach*, 1 Phila. 99, an instrument was given a double aspect. By it the tenant transferred the whole term, reserving a rent to himself. It was held an underletting as regarded an action, but an assignment as regarded the right of distress for rent.

In this conflict of authorities that class of cases of which *Lloyd v. Cozzens* and *Bedford v. Terhune* are examples seems to us to be founded on the better reason. The mere fact that a rent is reserved, whether of the same or of a greater amount than that paid to the original lessor, does not of itself reserve an estate in the term, or necessarily imply that there remains any actual positive right of reversion in the assignor or sublessor, use whichever expression we may, where the *whole term* is conveyed or sublet; nay, even where there is a right of reëntury reserved in case of nonpayment of rent, such reservation shows nothing more than the existence of a possibility of reverter, on breach of condition, and that, we have seen in cases of base fees (see *ante*, p. 26), is not an estate. Now, when one sets over the whole of his term, he as effectually conveys his whole estate as does one who, seized in fee, conveys in fee, and there is no reason why the introduction of a condition in the one case should be interpreted as raising the reservation of an estate in reversion any more than in the other. While, therefore, the reservation of the smallest part of a term will constitute the subdemise a subletting, yet where the whole term is transferred, we do not think the transaction can be made a subletting by the introduction of any reservation of rent or of any condition whose violation may destroy the assignee's interest in the term before its natural expiration.

Transfer of Entire Term in a Part of the Premises Demised.

As to the effect of a transfer of the entire term as to a portion of the premises demised, the cases are conflicting. It has, on the one hand, been held that if the lessee has, by any instrument, even if in form a sublease, transferred his entire interest in any portion of the demised premises, it is an assignment, *pro tanto*, *Woodhull v. Rosenthal*, 61 N. Y. 382; but, on the other hand, it has been held if the tenant lease a portion only of the demised premises, although for the whole of the unexpired term, the transaction is not, even as regards the land leased, an assignment, but is a mere subletting, *Patten v. Deshon*, 1 Gray 325; *M'Neil v. Kendall*, 128 Mass. 245; *Dunlap v. Bullard*, 131 Id. 161; *Fulton v. Stuart*, 2 Ohio 215.

Assigning or Subleasing may be a Cause of Forfeiture. Clause providing for Forfeiture strictly Construed.

A clause in a lease restraining assignment or subletting will, as we have already seen, be strictly construed. See cases *supra*, and in *Chipman v. Emeric*, 5 Cal. 49, it was doubted by the Court whether such a clause would ever be enforced so as to produce a forfeiture, for the reason that it was in restraint of alienation, and so against the policy of the law. It is, however, well settled that when such a clause provides for a forfeiture, and the acts of the tenant bring him within the prohibition, the law will enforce the forfeiture.

An instance of strictness of construction is to be found in *Roosevelt v. Hopkins*, 33 N. Y. 81, where it was held that a prohibition to sublet the premises was not a prohibition of subletting a portion thereof; and in the same case it was held that where a lease had been made to a firm, and the firm was changed by a dissolution and the taking in of new partners, who remained in possession of the demised premises under the lease, there was not a violation of a condition not to assign.

A covenant not to sublet is not violated by giving a *license* to lay railroad tracks over and upon the demised premises, *Pence v. St. Paul, Minneapolis and Manitoba R. W. Co.*, 28 Minn. 488; and a mere license to occupy is held not to be a sublease, *Leauke v. Barnett*, 47 Mich. 158.

A covenant not to assign is not broken where the assignment of the term is by act of the law, or by proceedings against the tenant whereby his term is taken in execution, unless the law is set in motion fraudulently by the tenant, as by a confession of judgment with a view to evade the covenant, or where the lease contains an agreement that the term shall not pass by operation of law, 4 Kent Com. 124; *Jackson ex d. Schuyler v. Corliss*, 7

Johns. 531; Jackson and Gross, L. & T. 56, note *a*. An honest confession of judgment and consequent levy upon the term are not a violation of the covenant, *Jackson v. Corliss*, *supra*.

A clause prohibiting assignment is broken by a mortgage of the leasehold, *Becker et al. v. Werner*, 98 Pa. St. 555; but it seems that a mere deposit of a lease as security for money will not be held to work a forfeiture. See *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Hogg*, 4 D. & R. 226.

Waiver of Forfeiture for Assignment or Subletting.

Of course, an assignment as a cause for forfeiture must, in order to divest the tenant's estate, be taken advantage of by the landlord, and if the landlord in any way assent to or recognize the assignment, he cannot afterwards set it up as a cause of forfeiture.

A suit for rent brought by the landlord against the assignee is a sufficient recognition of the assignment, *Sanders v. Partridge*, 108 Mass. 556, or the reception of rent after an assignment and with knowledge thereof, *Collins v. Hasbrouck*, 56 N. Y. 157; *O'Keefe v. Kennedy*, 3 Cush. 325; *Webster v. Nichols*, 104 Ill. 160; and if the landlord once consent to an assignment, his right to regard an assignment as a cause of forfeiture is gone, and the assignee may subsequently assign without the landlord's consent, *Dougherty v. Matthews*, 35 Mo. 520; *Murray v. Harway*, 56 N. Y. 337. In England a distinction has been taken with regard to waiver by the landlord of the breach of a condition not to assign and not to sublet, it being held that if the lessee sublet and the lessor waive the forfeiture, the waiver is *pro hac vice tantum*; and hence if the lessee, after the first underlease has expired, make another, the landlord may insist upon the forfeiture, *Doe ex d. Boscarven v. Bliss*, 4 Taunt. 735; 1 Sm. Leading Cases 101 (Ed. 1872). This distinction was approved in *M'Kildore v. Darracott*, 13 Gratt. 278.

Assignee Takes Subject to Burdens.

An assignee takes the term subject to all the burdens to which it was liable in the hands of the assignor, *Adams v. Beach*, 1 Phila. 99. When the assignment is by deed or writing, he becomes liable to the burdens upon his acceptance of the assignment, without actual entry, *Walton v. Cronly*, 14 Wend. 63; *Trabue v. McAdams*, 8 Bush 75; *Babcock v. Seoville*, 56 Ill. 461 (dissenting from *Damainville v. Mann*, 32 N. Y. 197); but the liability of the assignee lasts only during the time he holds the term, and he may free himself from future liability at any time by an

assignment, *Stern v. Florence Sewing Machine Co.*, 53 How. 478; *Bagley v. Freeman*, 1 Hilt. 196; *Armstrong v. Wheeler*, 9 Cow. 88; *Hurst v. Rodney*, 1 Wash. C. C. 375.

Assignment in Bankruptcy of Lessee.

An assignment in bankruptcy does not necessarily have the effect of an assignment of a lease held by the bankrupt, nor does the mere acceptance of his official position by the assignee render him assignee of the lease, *In re Ives, Green & Co.*, 18 Bank. Reg. 28; and he is not bound to take the lease unless it is for the benefit of the creditors that it should be taken, *White v. Griffing*, Id. 399.

Taxes.

As between the owner of the fee and the tenant for years, the latter is not bound to pay the taxes assessed upon the premises occupied by him, and in some States it is provided by statute that where he does pay the taxes, either by compulsion or to discharge the premises from the burden upon them, he may recover the amount paid from his landlord, or deduct it from the rent. Michigan, Act of Extra Session 1882, § 42, Howell's Ann'd Stat., p. 1277; New Jersey, Stewart's Revision (1877), p. 1145, pl. 33; New York, Rev. Stats. (1882), p. 1049, § 4; Minnesota, Stats. (1878), Ch. 11, § 103, p. 241; Wisconsin, Rev. Stats. (1878), § 1154, p. 370; Virginia, Code (1873), p. 375, pl. 10; West Virginia, Rev. Stats. (1879), Ch. 187, § 11, p. 1091; Pennsylvania, Acts, April 6, 1802, § 8; April 3, 1804, § 6; Pur. Dig. 876, pl. 2, 3. And it is presumed that wherever the question may be raised, the tenant, having paid the taxes under compulsion, will be held entitled to a credit for their amount against his landlord.

Impeachability for Waste.

The tenant for years must not commit waste or suffer it to be committed upon the demised premises, *Bullitt v. Musgrave*, 3 Gill 31; *Maddox v. White*, 4 Md. 72; *Long v. Fitzsimmons*, 1 W. & S. 530; *United States v. Bostwick*, 4 Otto 53; *Druhan v. Adam*, 9 La. Ann. 527; *California Dry Dock Co. v. Armstrong*, 17 Fed. Rep. 216; and his liability for waste does not depend upon whether or not he has been guilty of negligence, for he is liable for waste by whomsoever committed, unless it is by the act of God, the public enemy, or the reversioner, *Parrott v. Barney*, 2 Abb. U. S. 196. And this liability extends to the tenant of a portion of a building, for waste is not confined to lands, *Id.* The existence of a clause in the

lease requiring the return of the premises in good order, reasonable wear and tear excepted, will not relieve the tenant from liability for waste, *Id.*; and the specification of a certain business for which the premises are leased will not throw upon the landlord the risk of damage to the premises arising from that business, *Id.*

It is not, however, waste if the tenant of agricultural lands take wood for fuel, fences, agricultural erections, and such other necessary purposes, *Walters v. Hutchins*, 29 Ind. 136; *Harris v. Goslin*, 3 Harring. 340; *Hubbard v. Shaw*, 12 Allen 120; for he has a right to estovers, Co. Litt., 41 b; but cutting timber for staves, and other purposes not within the usual range of a tenant's license, is waste, *State v. Jackson*, 2 Harring. 542; so to cut wood for sale, *Harris v. Goslin*, *supra*. Even in the case of wild lands, the tenant has no right to destroy or sell timber, unless it appears that he could not enjoy the land to the best advantage for the purpose of cultivation without cutting the timber in question, *Moore v. Wait*, 3 Wend. 104. A custom that a lessee who clears land shall have the wood he fells, has been held a good custom, *Duncan v. Blake*, 9 Lea 534.

It is waste for the tenant to convert the land or premises from what they were at the time of the demise into something else, *Maddox v. White*, *supra*; *Davenport v. Magoon* (Supreme Court of Oregon), 3 West C. Rep. 328; or, in the absence of a license from the landlord, to make alterations, as by taking down partitions, *Agate v. Lowenbein*, 57 N. Y. 604, in which case DWIGHT, Com., said: "The right which the tenant has is to make use of the property; the power of making an alteration does not arise out of a mere right of using; it is, therefore, incompatible with his interest for a tenant to make any alterations, unless he is justified by the express permission of his landlord. . . . By a lease, the use, not the dominion, of the property demised is conferred. If a tenant exercise an act of ownership he is no longer protected by his tenancy." A license to make alterations will not allow a tenant to tear down a building and so reërect it as to destroy its identity, *Davenport v. Magoon*, *supra*.

A tenant sued for waste cannot set up in defence that he has farmed in a more beneficial manner than is required by his lease, *Bullitt v. Musgrave*, 3 Gill 31.

By the statute of Gloucester, 6 Ed. I., c. 5, a tenant for years committing waste was rendered liable to forfeit the place or thing wasted, and to pay treble damages to the reversioner, and this statute is presumably in force in those States where its place has not been supplied by another statute, and where the common law system itself has not been superseded by the enactment of a code. In Pennsylvania it was reported as in force by the judges, 3 Binney Appendix 601; and by the statutes of Kentucky, Gen. Stat. (1881,

Bull. & Fel.), Art. III., § 1, p. 607; Minnesota, Stats., 1878, § 26, p. 820; Missouri, 1 Rev. Stat. (1879), § 3107, p. 520; New Jersey, Stew. Rev. (1877), p. 1236, pl. 7; and New York, 4 Rev. Stat., § 1651, p. 329, the statute of Gloucester has been practically reenacted as regards tenant for years.

The statutes of Delaware, Rev. Code (1874), p. 536, §§ 1, 9, subject the tenant to forfeiture and double damages.

The statutes of Maine, Rev. Stat. (1871), p. 731-2, §§ 1-5; and of Massachusetts, Pub. Stat. (1882), p. 1038, § 1, to forfeiture and damages.

In Iowa, the tenant is subject to triple damages, and to forfeiture when the damages exceed two-thirds of the tenant's interest, M'Clain's Statutes (1880), §§ 3332, 3334, p. 871.

In Indiana, Rev. Stat. (1881), §§ 286, 287, p. 50, and Oregon, Gen. Laws, 1872, p. 180, § 334, the tenant is subjected to forfeiture, and it is presumed that damages may be recovered in covenant or in an action on the case.

In California, Hittell's Code and Statutes, Vol. II., par. 10, 732, § 732, Colorado, Civil Code (1877), § 233; Nebraska, Stats. (Browne, 1881), p. 615, § 633; Nevada, Comp. Laws, p. 371, § 1313, the tenant for years is subjected to triple damages; and in Virginia, Code (1873), p. 967, pl. 4, and West Virginia, Stats. (1879), p. 1162, § 4, to the same measure, if the waste is wantonly committed.

The statutes of Michigan, Comp. Laws (1871), pp. 1792-3, §§ 1, 6; District of Columbia, Rev. Code (1867), p. 272, §§ 4, 6; and Wisconsin, Rev. Stat. (1878), p. 820, §§ 3171, 3173, impose double damages.

The statute of Connecticut, Rev. Gen. Stat. (1875), Tit. 19, Ch. 16, § 9, p. 490, simply subjects the wasting tenant to an action on the case, and that of South Carolina merely subjects him to the payment of damages, Gen. Stat. (1882), § 1822, p. 535.

Repairs. What Repairs Must be Made by Tenant.

In the absence of any stipulation, it is the duty of the tenant to make fair, ordinary, and tenantable repairs, such as are necessary to prevent waste, *Russell v. Rush*, 2 Pittsb. 134; *Suydam v. Jackson*, 54 N. Y. 450; *Chicago v. O'Brennan*, 65 Ill. 160; *Gridley v. Bloomington*, 68 Id. 47; *Lowell v. Spaulding*, 4 Cush. 277; *Bears v. Ambler*, 9 Pa. St. 193; *Grier v. Sampson*, 27 Id. 183; *Cornell v. Vanartsdalen*, 4 Barr 364; *Kline v. Jacobs*, 68 Pa. St. 57; *Hitner v. Ege*, 23 Pa. St. 305; *Kellenberger v. Foreman*, 13 Ind. 475. One consequence of this rule is that, in case of damage suffered by a third person through the non-repair of premises, the tenant is *prima facie* liable therefor, *Bears v. Ambler*, 9 Pa. St. 193; *Grier v. Sampson*, 27 Id. 183; *Chicago v. O'Brennan*, 65 Ill. 160; *Gridley v. Bloom-*

ington, 68 Ill. 47; the presumption of liability may, however, be rebutted, *Chicago v. O'Brennan*, *supra*.

This liability of the tenant does not extend to making substantial and permanent repairs, such as putting on a new roof or renewing the floor of a stable, *Long v. Fitzsimmons*, 1 W. & S. 530; *Scheerer v. Dickson*, 7 Phila. 472, 3 Brews. 276; *Johnson v. Dixon*, 1 Daly 178; but if he make such repairs he cannot charge his landlord with them, *Long v. Fitzsimmons*, *supra*; *Kline v. Jacobs*, 68 Pa. St. 57; *Cornell v. Vanartsdalen*, 4 Pa. St. 364.

The tenant's obligation to repair does not extend to cases in which the premises are destroyed by lightnings, floods, tempests, or public enemies, *Pollard v. Shaffer*, 1 Dall. 210.

Landlord not Compellable to Repair.

In the absence of a covenant, the tenant for years cannot compel his landlord to repair the demised premises, or hold him liable for damage resulting from non-repair, since the landlord is under no obligation to make repairs, *Moore v. Weber*, 71 Pa. St. 429; *Scott v. Simons*, 54 N. H. 426; *Witty v. Matthews*, 52 N. Y. 512; *Mumford v. Brown*, 6 Cow. 475; *Walz v. Rhodes*, 1 W. N. C. 49; *Kastor v. Newhouse*, 4 E. D. Sm. 20. In Indiana, it is even held that the tenant will not be allowed to set up a custom by which the landlord is required to repair, *Biddle v. Reed*, 33 Ind. 529.

Rule where Landlord Retains Control of a Part of the Building of which he has Leased Part.

This rule, however, does not excuse a landlord who has leased a portion of a building, and retains possession or control of another portion of it, from liability to his tenant for injuries suffered through his negligence in allowing the part of the building controlled by him, or in which he had a right to make repairs, to fall into decay, *Glickauf v. Maurer*, 75 Ill. 289; *Stapenhorst v. American Manufacturing Co.*, 15 Abb. Pr. (N. S.) 355; *Eagle v. Swayze*, 2 Daly 140. In the latter case a landlord was held liable to the tenant of a part of a dwelling, the rest of which was occupied by other persons, for damages resulting from the downfall of a chimney, the landlord's attention having been called to its ruinous condition.

In conflict with this case is *Krueger v. Ferrant*, 29 Minn. 385, where the landlord had rented different parts of his building to different tenants, and it did not appear that any tenant had control of the roof. The roof leaked and caused damage to the tenant of a lower story. It was held that there was no implied covenant on the part of the landlord to keep the roof in

repair, and therefore that he was not liable for the damage suffered through its non-repair.

Landlord may Make such Repairs as are Necessary to Prevent Ruin of Building.

While the landlord is not bound to repair, still he has the right to make such repairs as are necessary to keep the premises from falling into a ruinous condition, and the tenant, whose possession is otherwise inviolable, must suffer the landlord to enter for the purpose of making such repairs, *City of St. Louis v. Kaime*, 2 Mo. App. 66; *Sulzbacher v. Dickie*, 51 How. Pr. 500; but where the premises are destroyed by fire the landlord will not have a right of entry to rebuild without the tenant's assent, *Hoeveler v. Fleming*, 8 W. N. C. 65.

Statutory Variation of Common Rule as to Repairs.

The common law rule as to the liability to repair has been varied by statute in several States.

In Georgia, the landlord is bound to keep the premises in proper repair for the purpose for which they are rented; unless he is in a position to know the condition of the premises as well as the tenant, he is entitled to notice of the defects before his obligation attaches; but if he knows of the defects, or is in a position to know them, the obligation attaches without notice, Code (1882), § 2284; *White v. Montgomery*, 58 Ga. 204.

In California, in the absence of an agreement to the contrary, the lessor of a dwelling-house must put it into a condition fit for occupation, and repair all subsequent dilapidations which render it untenable, except such as are occasioned by the ordinary negligence of the lessee, Civil Code, §§ 6941, 6929. If, after receiving notice, the lessor does not repair, the lessee may make the needful repairs at the lessor's expense, when the expenditure does not exceed the amount of one month's rent, Id., § 6942.

In Louisiana, the lessor is bound to make, during the lease, those repairs which accident may render necessary, Code (1875), Art. 2693; if he do not make them after receiving notice from the lessee, the latter may make them, and on proving that they were indispensable, and that the price paid for them was just and reasonable, may deduct the amount from the rent, Id., Art. 2694. The conditions of the latter article must be complied with to authorize the tenant to repair at the landlord's expense, *Hennen v. Hayden*, 5 La. Ann. 713; *Talley v. Alexander*, 10 Id. 627.

In Connecticut, a tenant is excused from the payment of rent while the demised premises are untenable, they having become so without his fault, Rev. Gen. Stat. (1875), Tit. 18, Ch. 6, Pt. 1, § 16, p. 354.

Improvements.

If a tenant for years make improvements upon the demised premises, and leave them at the expiration of his term, no right to remove them having been reserved, they will become the property of the owner of the fee, *Mayor, etc., of New York v. Exchange Fire Ins. Co.*, 3 Abb. App. 261; *Gudgell v. Duvall*, 4 J. J. Mar. 227; *Gay v. Joplin*, 4 McCrary 459; *Wilson v. Scruggs*, 7 Lea 635; and even where the tenant has made improvements, and is afterwards evicted by one claiming by a title superior to the landlord, and the latter is afterwards sued by the evictor for mesne profits, and obtains the benefit of the improvements by way of set-off, the tenant cannot recover their value from the lessor, *Lanigan v. Kille*, 97 Pa. St. 120; and it is also held that when a tenant for years, under the erroneous impression that he is in for the term of his lessor's life, makes improvements, he is not entitled to be reimbursed therefor on the expiration of his term, *Dunn v. Bagby*, 88 N. C. 91.

Accordingly, the matter of improvements is frequently made a subject of contract in a lease, as by providing that the tenant shall have permission to remove the improvements made by him, or that he shall be compensated for them. When the lease provides that the tenant shall have leave to remove the improvements *at the end* of the term, he will be entitled to a reasonable time thereafter within which to make such removal, *Cheatham v. Plinke*, 1 Tenn. Ch. 576; *Kuhlman v. Meier*, 7 Mo. App. 261; and such a provision will not prevent the removal being made during the term, *Alexander v. Touhy*, 13 Kan. 64. In *Smith v. Park*, 31 Minn. 70, where the lessee had not removed certain buildings within five months after the termination of the lease he was held to have exceeded reasonable limits. When the covenant provides for compensation, as that the lessor shall take the improvements at a valuation, there is no lien upon the land for the amount unpaid, *Hite v. Parks*, 2 Tenn. Ch. 373; *Whitlock v. Duffield*, 2 Edw. Ch. 366; and a covenant to pay for the improvements does not run with the land, *Thompson v. Rose*, 8 Cow. 266; *Bream v. Dickerson*, 2 Humph. 126; *Hite v. Parks*, *supra*; and see *Cronin v. Watkins*, 1 Tenn. Ch. 119.

In *Tallman v. Coffin*, 4 N. Y. 134, it was held that a covenant to yield possession "upon the lessor's paying for the improvement," did not make such payment a condition precedent, so as to enable the lessee to hold the premises after the expiration of his term and until such payment; but in *Holsman v. Abrams*, 2 Duer 435, there was agreement on the part of the lessor to give to the lessee a new lease at an appraised rent, excluding the value of the improvements, or to pay for the improvements, it was held that the lessee might remain in possession, paying rent, until he was paid

for the improvements. And to the same effect, see *Paine v. Rector and Vestry of Trinity Church*, 14 N. Y. S. C. 89.

Where the lease specifies for what improvements the tenant shall be allowed compensation, he cannot claim compensation for others. Thus where the lease provided that the tenant should take down an old building and erect a new one, and should be allowed compensation therefor, and instead of so doing he made alterations and improvements in the original building, it was held that he had no claim for compensation, *Smith v. Cooley*, 5 Daly 401; and where the contract called for the erection of a dwelling-house, and the tenant built a shop, which could be converted into a dwelling in a short time, it was held that the tenant was not entitled to compensation, although the landlord had not given notice of his want of satisfaction until too late, and had concurred in the appointment of appraisers to value the improvement, having however informed them before they had acted that the building was not according to the contract, *Pike v. Butler*, 4 N. Y. 360.

In Louisiana, under the Code, the tenant is not entitled to compensation for improvements made without the consent of the landlord, unless they are necessary and indispensable for the premises. He may, however, remove them, if he leave the premises in the same state as before he took them; but if they are made with lime and cement, the lessor has the option of retaining them on paying their value. Code, § 2697; *Sigur v. Lloyd*, 1 La. Ann. 421; *Talley v. Alexander*, 10 Id. 627.

Fixtures—Right to Remove.

An exception to the rule that what is joined to the freehold becomes part of it, and the property of the freeholder, is found in the policy of law which encourages trade, and which prevents the application of this rule to the case of those erections upon and additions to premises which are known as fixtures.

Fixtures erected by a tenant for years may be removed by him, *Van Ness v. Pacard*, 2 Pet. 137, at any time during his possession of the premises by virtue of his term therein, *Tate v. Blackburne*, 48 Miss. 1; *Donnelly v. Thieben*, 9 Bradw. 495; or while his right of enjoyment lasts, *Cromie v. Hoover*, 40 Ind. 49, as where he holds over by the consent of his landlord, *Bircher v. Parker*, 40 Mo. 118; *Mason v. Fenn*, 13 Ill. 525; *Neiswanger v. Squier*, 73 Ill. 192, or under a fair claim as tenant, *Ex parte Hemenway*, 2 Low. 496; *Kerr v. Kingsbury*, 39 Mich. 150; and if the removal can be made without serious injury to the freehold, *Allen v. Kennedy*, 40 Ind. 142; *Amb's v. Hill*, 10 Mo. App. 108; if in the removal the freehold is injured,

the tenant is liable in damages, *Seeger v. Pettit*, 77 Pa. St. 437; but when the lease authorizes the introduction and removal of machinery the tenant is not liable for such damage to the freehold as may be reasonably held to have been contemplated from the fact of such authorization, *Hunt v. Potter*, 47 Mich. 197. This right to remove passes to the purchaser of the fixtures at a sheriff's sale upon an execution against the tenant, *Heffner v. Lewis*, 73 Pa. St. 302.

Must be Removed during Possession under Lease.

After the term of the tenant, or his possession under it, has ended, the right to remove is gone, *Allen v. Kennedy*, 40 Ind. 142; *Thomas v. Crout*, 5 Bush 37; *Davis v. Moss*, 38 Pa. St. 346; *Seeger v. Pettit*, 77 Id. 437; *Danach v. Bana*, 13 W. N. C. 332; but if the removal of the fixtures during the term is prevented by the landlord, the tenant will be entitled to a reasonable time thereafter within which to make the removal, *Bircher v. Parker*, 40 Mo. 118; *Mason v. Fenn*, 13 Ill. 525; *Goodman v. Hannibal and St. Joseph Railroad Co.*, 45 Mo. 33. The right is lost by the surrender of possession, and not by mere non-payment of rent and a notice to quit, and if the landlord attach the fixtures, the right to remove them is not lost even by quitting, *Ex parte Hemenway*, 2 Low. 496.

A question has arisen whether, when the tenant, at the end of his term, takes a new lease, his right to remove the fixtures still exists. In *Merritt v. Judd*, 14 Cal. 59, it was held that the right did not exist under such circumstances. The same question arose in *Loughran v. Ross*, 45 N. Y. 792, and the same position was taken. From the report of the case it does not appear whether the new lease expressly mentioned the buildings or not. ALLEN, J., in delivering the opinion of the Court, said: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of them or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy and not under the old, and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease of the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant accepting a lease of the premises, without excepting the buildings, takes a lease of the land with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from contradicting it." In this opinion, CHURCH, C. J., FOLGER

and ANDREWS, JJ., concurred, and from it GROVER and PECKHAM, JJ., dissented.

The Supreme Court of Michigan, on the question coming before it, in *Kerr v. Kingsbury*, 39 Mich. 150, held the contrary doctrine. "But why," said COOLEY, J., "the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant the right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble and incur the loss of removing your erections during the term, and of afterwards bringing them back, they shall be yours, otherwise you will be deemed to abandon them to your landlord.'" And with reference to the opinion in *Loughran v. Ross*, above cited, the same learned Judge said: "This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable."

It is submitted that the decision of the Supreme Court of Michigan is founded in much sounder reason than the contrary decisions. The reason for allowing the removal of fixtures, besides the encouragement of trade, is that the fixtures, having been affixed to the freehold for certain purposes of the tenant's trade, no presumption of an intent to make them a part of the freehold can arise from such affixment; now, until such a presumption arises, the presumption that the tenant intends to exercise his right of removal continues, as does also the presumption that the fixtures are allowed to remain on the premises simply because it is more convenient for the tenant for the purposes of his trade that they should so remain. During the term there can be no question that this is so. Now, in general, the inducement to a tenant, on the expiration of his term, to take a new lease of the premises occupied by him for trade, when no change is made in their character, is that it is more convenient for him to continue his business there than elsewhere; in other words, as to his business and the fixtures used therein, there is the same continuous intent on the part of the tenant as that with which he erected the fixtures. They were erected solely for business purposes, and with the intent to take them away when they would be more useful, or of more value, to the tenant elsewhere, or in case he should desire to replace them with improved appliances. In many

cases, doubtless, the fact that the tenant has erected valuable fixtures will be a cause of his seeking a new lease rather than go to the expense of moving; it would be very strange then if this very desire to continue his business upon the former basis should be held to defeat itself by depriving the tenant of his dominion over those fixtures upon which he depended to carry it on.

Before leaving the subject of fixtures it may be noted that the rule with regard to them, as laid down in the California Code, is practically that of the common law. It is as follows: Tenant for years may remove during the continuance of the term anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises. Civil Code, § 6019, Vol. I., (Ed. 1876).

Manure.

Where land is let for agricultural purposes, the manure made upon it is generally held to pertain to the farm, and not to be the absolute property of the tenant, and hence, on the termination of his tenancy, he has no right to remove it, *Plumer v. Plumer*, 30 N. H. 558; *Needham v. Allison*, 24 Id. 358; *Whetherbee v. Ellison*, 19 Vt. 379; *Lassell v. Reed*, 6 Me. 222; *Waln v. Connor*, 5 Clark (Pa.) 164; *McAdlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill 142; *Daniels v. Pond*, 21 Pick. 371; *Lewis v. Jones*, 17 Pa. St. 262; *Sawyer v. Twiss*, 26 N. H. 345. This rule does not apply to lands let for general purposes, *Needham v. Allison*, *supra*, or where the manure is made by cattle fed upon the land with provender brought from other sources, *Gallagher v. Shipley*, 24 Md. 418, provided the manure has not become so mingled with the soil that it cannot be removed without injury to the land, *Id.*; but where the manure has been made partly by provender brought from outside and partly from that supplied by the premises, then, on the principle which governs in cases of the commingling of goods, the tenant will not be permitted to remove it, *Lassell v. Reed*, 6 Me. 222; *Lewis v. Jones*, 17 Pa. St. 262. The removal may be restrained by a writ of estrepement, *Barrington v. Justice*, 2 Clark (Pa.) 289. A grazing farm has been held to be agricultural land within the above rule, *Waln v. Connor*, 5 Clark 164. In North Carolina the law is otherwise than as above stated, and in the absence of a covenant the outgoing tenant may remove the manure made by him on the premises, *Smithwick v. Ellison*, 2 Ired. Law 326.

Waygoing Crop.

In this country there is a difference, and one may say an irreconcilable difference, amongst the authorities as to whether the tenant for years is entitled to the waygoing crop, that is, the crop which, having been sown by him during the tenancy, does not ripen until after its termination. At common law the right to this was conceded to tenants at will, see *Co. Litt.*, 55 b; except where they themselves determined the will, *Id.*; *Oland v. Burdwick*, Cro. Eliz. 460; *Oland's Case*, 5 Co. 116; but refused to tenants for years, for the reason that, as the tenant for years knew when his term would be ended, it was his own folly to sow when he knew he could not reap, *Litt.*, Sect. 68. In *Wigglesworth v. Dallison*, Doug. 201, the Court of King's Bench, however, sustained a local custom that the tenant should have the waygoing crop. Lord MANSFIELD, in delivering the opinion, said: "It is indeed against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly."

The question as to the right of the tenant for years to the waygoing crop was early brought before the courts in this country.

In 1782 it came before the Supreme Court of Pennsylvania at *nisi prius*, in *Diffendorffer v. Jones*, unreported, but mentioned by YEATES, J., in 2 Binn., at page 487, and 5 Binn., at page 289; and it was held by M'KEAN, C. J., that, by the custom of Pennsylvania, the tenant for years was entitled to the waygoing crop. This case was decided before the publication in this country of *Wigglesworth v. Dallison*.

In 1812 it came before the Court in Banc, *Stultz v. Dickey*, 5 Binn. 285, and the law was settled to be as laid down by M'KEAN, C. J. TILGHMAN, C. J., cited *Wigglesworth v. Dallison*, and said: "There the custom was limited to a particular part of England. With us it is supposed to extend throughout the State. In the nature of the thing it is reasonable that, where a lease commences in the spring of one year and ends in the spring of another, the tenant should have the crop of winter grain sown by him in the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of the winter crop. If the parties intend otherwise, it is easy to control the custom by an express provision in the lease." YEATES, J., who had been of counsel in *Diffendorffer v. Jones*, said, alluding to the decision in that case: "Though I was dissatisfied with the opinion then delivered, yet I have never heard the doctrine questioned since;" and BRACKENBRIDGE, J., though he dissented from the opinion of

the Court on another ground, yet agreed with it as to the validity and existence of the custom.

This decision is sustained in *Biggs v. Brown*, 2 S. & R. 14; *Myers v. White*, 1 Rawle 353; *Forsythe v. Price*, 8 Watts 282; *Clark v. Harvey*, 54 Pa. St. 142; *Comfort v. Duncan*, 1 Miles 229; *Hunter v. Jones*, 7 Phila. 233; *Shaw v. Bowman*, 91 Pa. St. 414; but the right is confined to crops which, in the ordinary course of a year's husbandry, the tenant would have a right to expect; he will not have the right to sow just before the expiration of his lease a crop of spring grain and claim the right to it, *Demi v. Bossler*, 1 P. & W. 224; and it is to be noticed that where the tenant is ejected for a breach of condition, he has no right to reënter to gather crops left in the ground, either under a claim for emblements or by virtue of the custom of Pennsylvania, *Hunter v. Jones*, 2 Brewst. 370.

The right of the waygoing tenant is recognized in Delaware, *Templeman v. Biddle*, 1 Harring. 522, but is there not extended to the oat crop, *Id.*; New Jersey, *Van Doren v. Everitt*, 2 South. 460; *Howell v. Schenck*, 4 Zab. 89, where it is confined, as in Pennsylvania, to the winter crops, and it does not extend to oats, *Howell v. Schenck*, *supra*; Ohio, *Foster v. Robinson*, 6 Oh. St. 90; and from the remarks of the Court in *Lewis v. McNatt*, 65 N. C. 63, it would seem to be recognized in North Carolina. The waygoing crop will include straw, *Craig v. Dale*, 1 W. & S. 509.

The tenant's power over his crop is absolute; he is not bound to remove it himself, but may sell it, *Doremus v. Howard*, 3 Zab. 390. He will be entitled to the crop as against a mortgagee, who defeats the term of years either by entry or judicial proceedings, *Cassilly v. Rhodes*, 12 Ohio 88; but this would be also the case at common law in England, for it is a case of an uncertain termination; and as against the sheriff's vendee, when the land is sold upon execution issued on a judgment antedating the lease, where the crop has been sown prior to the levy and condemnation of the land, *Bitting v. Baker*, 29 Pa. St. 66, overruling *Sallade v. James*, 6 Id. 144, and *Groff v. Levan*, 16 Id. 179.

On the other hand, the courts in several of the States have maintained the old common law rule, and refused to allow the tenant for years the right to the waygoing crop, and the reasons which have influenced the courts which have so decided are, perhaps, by no one better stated than by CABELL, J., in *Harris v. Carson*, 7 Leigh 632; after citing the opinion of Lord MANSFIELD in *Wigglesworth v. Dallison*, the learned Judge said: "I entirely concur in the correctness of this opinion as applied to a case in England. But it is correct not on the ground of direct contract, or because the parties are presumed to have contracted in reference to the custom. It is correct because of the force of the custom, as such; for in England,

where they have particular customs, the custom of the county in which the land lies is as much the law of that county as the common law is the law of the other parts of the country where they have no such particular custom. The particular custom prevents the application of the common law to the county or district in which the custom prevails, by showing that the common law as to the subject never had any existence in that county or district. For a custom to be valid it must be as old as the common law, it must be immemorial. And if the particular custom be proved to be immemorial, it necessarily excludes the general custom or common law, for two opposite and inconsistent customs cannot have immemorially existed in the same place and as to the same thing.

“But the case is widely different in this country. Our ancestors brought with them the common law, or general custom, of England, but not the particular customs. The common law became the law of our whole State, and gave the rule to every part of it, and we have seen that by that law the offgoing tenant was not entitled to the waygoing crop. Any practice or usage, however general, introduced into the country since its settlement, and in opposition to the common law, can have no force on the ground of custom, because it lacks the essential ingredient of a good custom—it is not immemorial. It is clear that it could not have existed at any time, even as a recent custom, until after the settlement of the country, and after the common law had attached to every part of it. And nobody will contend that a recent usage or practice, however general, will change the common law. Nor is the case of the plaintiff in error helped by the argument that the custom, although not obligatory as such, may nevertheless be looked to as having been within the contemplation of the parties at the time they contracted, and may therefore be regarded as an exponent of the contract. The principle of explaining a written instrument by parol testimony applies to those cases only where there is some latent ambiguity in the written instrument, or where its terms have not a definite legal signification, *Bowyer v. Martin, etc.*, 6 Rand. 525. Here there is no ambiguity, no uncertainty, no doubt whatever. It is nothing more nor less than a lease for a period fixed and certain, when the interest of the tenant is to cease and determine. To extend it beyond that period by parol testimony is contrary to received principles and utterly inadmissible.”

The common law is recognized as still in force and unmodified in this respect by custom in *Mason v. Moyers*, 2 Rob. (Va.) 606; *Whitmarsh v. Cutting*, 10 Johns. 360; *Bain v. Clark*, Id. 424; *Reeder v. Sayre*, 70 N. Y. 180; *Brooks v. Galster*, 51 Barb. 196; *Dircks v. Brant*, 56 Md. 500; *Rasor v. Qualls*, 4 Blackf. 286; and it is held that where the original lease provides that the tenant may at his option extend his term, and he elects not

to extend it, he will have no right to the waygoing crop, *Dircks v. Brant, supra*; but where the tenancy for years is unexpectedly terminated, except by the act of the tenant himself, he will have a right to the crop planted by him before such termination; thus, where a husband made a lease of his wife's lands, and the lease was destroyed by a divorce *a vinculo matrimonii*, the tenant was held to have the right of ingress and egress to remove his crops planted before the termination of the tenancy, *Gould v. Webster*, 1 Tyler (Vt.) 409; and in *Stewart v. Doughty*, 9 Johns. 108, there was a lease for six years, terminable within that time by notice from the landlord, and if so terminated an allowance was to be made to the tenant for preparing the ground for the reception of seed and for any other extra labor performed by him. Notice was given in accordance with the terms of the lease. It was held that the tenant was entitled to emblements.

Term of Years Liable for Debts of Tenant.

A term of years is liable for the debts of the tenant, and, being a chattel real, is liable to execution as personalty, and does not require the same formality to subject it to sale as is required in the case of a freehold estate, *Dalzell v. Lynch*, 4 W. & S. 255; *Sowers v. Vie*, 14 Pa. St. 99; *Williams v. Downing*, 18 Id. 61; *Buhl v. Kenyon*, 11 Mich. 249; *Thomas's Lessee v. Blackemore*, 5 Yerg. 113; *Shelton v. Codman*, 3 Cush. 318; *Bisbee's Lessee v. Hall*, 3 Ohio 449; it may therefore be sold under a writ of *fiery facias*, without inquisition and condemnation, *Dalzell v. Lynch*, *Williams v. Downing, supra*; and it may even be sold by a constable on an execution issued by a justice of the peace, *Doe ex d. Glenn v. Peters*, Busbee, Law 457; *Barr v. Doe ex d. Binford*, 6 Blackf. 335; the law is, however, otherwise in New York, under the provisions of the statute regulating levies and sales by constables under justices' writs, *Putnam v. Westcott*, 19 Johns. 73.

If a levy, or sale, or execution of a term is made as of realty, no title will pass to the purchaser, *Chapman v. Gray*, 15 Mass. 439; *Buhl v. Kenyon*, 11 Mich. 249.

A term of years, of no matter how great length, is not subject to the lien of a judgment, *Merry v. Hallett*, 2 Cow. 497.

The law has, in the case of long leases, been held otherwise in Connecticut, *Perez Mun et ux. v. Carrington*, 2 Root 15, in which case the Court departed widely from the principles of the common law. In Ohio, since the legislation on the subject, permanent leaseholds are treated, for the purposes of judgment lien and execution, as realty, *McLean v. Rockey*, 3 M'L. 235; *Lowry v. Melendy*, 11 Ohio 355; *Northern Bank of Kentucky v. Roosa*, 13

Id. 334. In Missouri, a lease of which three years remain unexpired is to be levied on as realty and is not subject to the execution of a justice. Rev. Stat., Ch. 32, § 2355, p. 393.

**Tenant has no Power to Encumber Reversion. Mechanic's Lien.
When Consent of Landlord to Imposition of Lien is Inferred.**

The tenant for years has no power to encumber the reversion without the consent of the landlord. His dominion, of course, stops with his own estate in the term, and there is no agency to be implied from his position as tenant whereby he can bind his landlord; as a consequence of this he cannot make a contract which will support a mechanic's lien on the fee. This was held in *Harman v. Allen*, 11 Ga. 45, under a statute which permitted the agent or superintendent of the owner to create a lien upon the estate. LUMPKIN, J., said: "It has been contended that the words agent and superintendent include those who *de facto* control the property, irrespective of the ownership. If so, then a mere trespasser or disseisor who wrongfully obtains the custody might encumber the estate with the most ruinous burdens. Such, we apprehend, could not have been the intention of the legislature. None but the rightful owner, his agent and superintendent, can exercise this power, and inasmuch as the tenant for the time being is the rightful owner he may by his contract bind the property to the extent of his interest and no further."

That the tenant cannot originate a mechanic's lien which will bind the reversion, see *Mills v. Matthews*, 7 Md. 315; *Kirk v. Taliaferro*, 8 Sm. & M. 754; *M'Carty v. Carter*, 49 Ill. 53; *Baylies v. Sinex*, 21 Ind. 458; *Wilkerson v. Rust*, 57 Id. 172; and there will be no implication of consent by the landlord drawn from the fact that the lease contains a covenant by the lessee to repair and make alterations, *Francis v. Sayles*, 101 Mass. 435; *Knapp v. Brown*, 11 Abb. N. S. 118; or from the consent of the landlord that the lessees may improve "at their own cost," although the undertaking on the part of tenants to make such improvement be the consideration for an extension of their lease, *M'Clintock v. Criswell*, 67 Pa. St. 183. It is otherwise, however, where the contract between lessor and lessee, although in the form of a lease, is, in reality, in whole or in part, a building contract; in such case the action of the tenant for years in proceeding to build will undoubtedly entitle the mechanics to a lien upon the reversion. See *Woodward v. Leiby*, 36 Pa. St. 437; *Lerby v. Wilson*, 40 Id. 63; *Hopper v. Childs*, 43 Id. 310; *Fisher v. Rush*, 71 Id. 40; *Barclay v. Wainwright*, 86 Id. 191. The absence or presence of an express covenant to build will not of itself distinguish a building contract from an improvement lease; it is true the syllabus in

Reid v. Kenney, 4 W. N. C. 450, is to the effect that the lease will not be held to give power to the tenant to bind the reversion without such a covenant, but this is expressly declared not to be the law in *Barclay v. Wainwright*, *supra*, and it would seem that the Court will in all cases endeavor to discover the true intention of the parties. Thus in *Barclay v. Wainwright* there was no covenant to build, but the amount of rent which the lessee was to pay was to be directly affected by his building or not building; if he did build he was to be released from the payment of the stipulated rent for the first year. As said by the Court: "In effect the lessor contributed this sum of \$8840 towards the erection of the building. This lease is doubtless a very ingenious instrument, but if we were to allow it to prevail as a mere improvement lease, the lien of mechanics and materialmen might in every case be evaded."

The true test seems to be found in the question, is the expense of the buildings or of the repairs, authorized by the lease, to be borne by the landlord or by the tenant? As said by BUTLER, J., whose opinion was adopted by the Supreme Court, "Where, however, the tenant contracts with the landlord to build or to add to or repair buildings, for compensation to be made by the landlord, either in money or the occupation and use of the premises, he is in the first instance under the general statute and in the second under the special one here, properly regarded as an ordinary contractor to build or repair. He is the landlord's agent holding possession for him, building and repairing for him at his ultimate cost; and the building is liable to lien, as in all other cases of building and repairing by contract. Occasionally such contracts have been inadvertently called improvement leases, but they are not, in the ordinary meaning of that term," *Hall v. Packer*, 94 Pa. St. 109. In that case a lease had been made at \$5 for the first year, \$500 for the second, and \$600 for the third, the lessees agreeing, "in consideration of the low rent" for the first year, to make certain specified repairs to the premises. It was held that a lien could be maintained against the fee. The same test was applied in *Boteler v. Espen*, 99 Pa. St. 313, where there was a rent reserved of \$2000 for the first year and \$2500 per annum thereafter, until the last year, when the rent should be \$3000, and the tenant covenanted to make all necessary repairs. It was held that a lien would not be sustained for such repairs, GREEN, J., in delivering the opinion of the Court, saying, "The absolute covenant of the tenant, that he would make the repairs as well as pay the rent, without any provision for reimbursement or compensation in any manner, is certainly inconsistent with the right to charge the building with the cost of the work. The suggestion that the rent for the first year is \$2000, while for the next three years it is \$2500, affords no inference that the difference of \$500 was

intended as a compensation for the cost of repairs. It would require an express agreement that the difference was made on that account to give it such effect as was the case in *Hall v. Parker, supra*. The abatement of \$500 for the first year is counterbalanced by an increase of \$500 during the last year; but independently of that it is not at all uncommon to make leases, especially of buildings used for hotel purposes, upon a rising scale such as this, as an inducement to tenants."

Under the New York Statutes it is held that in the county of New York, in order to charge the landlord's estate, there must be some voluntary act of the landlord or his agent, which results in the delivery of the material or in contracting of the debt for which the lien is filed, before the landlord's estate can be subjected thereto. In *Cornell v. Barney*, 33 N. Y. S. C. 134, affirmed 94 N. Y. 394, Barney leased to one Salem certain property for fifteen years at a specified rent. By the agreement Salem was to build, by January 1, 1878, a brewery worth \$50,000; Barney was to advance \$25,000, to be secured by a mortgage on the interest of the tenant in the building; there was also a covenant for a renewal of the lease for fifteen years should Salem build the brewery; if he did not fulfil his contract to build, the term was to cease and the fixtures and buildings become the property of the lessor. The plaintiff, who had furnished material for the building, claimed that he was entitled to a lien therefor on the landlord's interest, but the Court said, "But neither that circumstance [*i. e.* that of the agreement to make the loan] nor the obligation imposed upon the tenant to erect or cause the building to be erected was sufficient to render the owner's property liable for the payment of this debt; for neither of these circumstances nor both taken together either caused the material to be delivered or established the fact that they had been procured at the instance of the owner or of his agent." In its opinion the Court also pointed out that by the law in New York, in all places outside of New York, Onondaga, Rensselaer, and Buffalo counties, the consent of a landowner to improvements by his tenant would subject the freehold to a mechanic's lien.

Subjection of Term to Mechanic's Liens.

The term itself has been in several cases held subject to the mechanic's lien, *Alley v. Lanier*, 1 Cold. 540; *Butler v. Rivers*, 4 R. I. 38; *Harman v. Allen*, 11 Ga. 45 (but since the decision in this case the code declaring the tenant's interest to be a mere usufruct has been adopted); *Choteau v. Thompson*, 2 Oh. St. 114; *Dutro v. Wilson*, 4 Id. 101; *Dobschuetz v. Holli-day*, 82 Ill. 372; and it is held that a surrender will not destroy the

lien, but that the tenant's interest will be subject in the hands of the landlord to the lien, without, however, affecting his reversionary interest, *Dobshuetz v. Holliday*, *supra*. In Iowa, a leasehold is subject to a mechanic's lien by force of statute. Gen. Act (McClain Ann.), Ch. 100, § 4, p. 597.

On the other hand, the estate for years has been considered to be incapable of sustaining a lien except where it is expressly mentioned, and that for that purpose it will not be generally included in the word estate or estates in acts conferring liens.

This it is thought will be held the law generally throughout the United States.

In Pennsylvania, at one time, the power of the tenant was recognized as of a much more extended character than in most places. In *Holdship v. Abercrombie*, 7 Watts 52, it was held that, under the early mechanic's lien laws of Pennsylvania, a tenant for years who erected a building upon ground demised to him, thereby subjected it to mechanics' liens, and that on such lien being pushed to judgment, execution, and sale, the fee would be vested in the purchaser at sheriff's sale. This was in 1839. In 1840, an act of legislature was passed providing that the mechanic's lien act of June 16, 1836, which had not been before the court in *Holdship v. Abercrombie*, should not be construed to extend to any other or greater estate in the ground on which any building might be erected than that of the person or persons in possession at the time of commencing said building, and at whose instance the same was erected; nor should any other or greater estate than that above described be sold by virtue of any execution authorized or directed by said act. Act April 28, 1840, § 24.

It is true that the decision in *Holdship v. Abercrombie* was upon earlier acts, and that BURNSIDE, J., would seem to limit its effect by his remarks in *M' Clelland v. Herron*, 4 Pa. St. 63; but COULTER, J., in *Lyon v. M' Guffey*, Id. 126, speaks of the principle as too firmly established to be overturned except by legislative interference, and says: "The Act of 1836, on the same subject, embodied the provisions of the Act of 1806, on which the decisions were founded; and although no judicial construction was given to that act in this respect, as all the cases decided had occurred before its passage, yet there is little, if any, doubt but that it would have received the same construction if the legislature had not interposed the provisions of the statute of the 28th of April, 1840." Since the act it has been held that the leasehold is not subject to a mechanic's lien, *Church v. Griffith*, 9 Pa. St. 117; *Haworth v. Wallace*, 14 Id. 118; *Sheenley's Appeal*, 70 Id. 98; *Hess v. Marks*, 11 Lancaster Bar 131; *Rider v. Kohler*, 39 Leg. Intell. 338; nor are the buildings erected by the tenant, *Haworth v. Wallace*, *supra*; *Gaule v. Bilyeau*, 25 Pa. St. 521.

Law as to Liens in Louisiana.

In Louisiana, under the Civil Code, the tenant cannot by his contract place a lien upon the reversion, *Sewall v. Duplessis*, 2 Rob. (La.) 66; and although the lessor consent that alterations in the demised premises be made, this will not be held to authorize the imposition of a lien for making such alterations, *Hoffman v. Laurans*, 18 La. 70.

Special Acts giving Liens upon Leasehold.

There are in Pennsylvania, and it is presumed in many States, mechanics' lien acts giving liens to leasehold estates of particular kinds or in particular localities; leasehold estates falling within these acts are, of course, excepted, so far as the acts go, from the operation of the principles laid down above.

Termination.

The most usual and natural way of termination of an estate for years is by the expiration of the time for which it is granted or limited; when it so expires no act on the part of either the reversioner or tenant is necessary to declare it ended, *Bedford v. McElherron*, 2 S. & R. 49; *Logan v. Herron*, 8 Id. 459; *Van Cortlandt v. Parkhurst*, 5 Johns. 128; *Gill v. Ogburn*, 1 W. N. C. 28; *Evans v. Hastings*, 9 Pa. St. 273; *Dorrell v. Johnson*, 17 Pick. 266; *Young v. Smith*, 28 Mo. 65; *Brandenburg v. Reithman* (Colorado), 2 W. C. Rep. 774. The common law in this respect is given statutory sanction in South Carolina, Gen. Stat. (1882), § 1811, p. 532; Kentucky, Gen. Stat. (1881), Ch. 66, Art. VI., § 2, p. 609; Mississippi, Rev. Code (1880), § 1330, p. 381; Missouri, Rev. St. (1879), § 3079, p. 515; Virginia, Code (1873), Ch. CXXXIV, § 5, 969; West Virginia, Rev. Stat. (1879), Ch. 113, § 5, p. 732. In Delaware, however, the rule is different, and notice to quit is required even if the letting is for a term certain, Rev. Code (1874), Ch. CL, § 14, p. 630; Ch. CXX., § 4, p. 707; and such would seem to be the law in Maryland also, Rev. Code (1878), Art. 67, VII., § 1, p. 703.

Manner of Calculating Time of Lease.

The manner of calculating the time for which a lease is to run is a matter of some interest. The old English rule, doubtless, was to exclude the day of the date of the instrument, when the lease was expressed to be "from" a certain day, and to include it when the lease was from the date, *datus* signifying delivery; but in *Pugh v. The Duke of Leeds*, Cowp. 714, it was held that the day of the date was to be included or excluded accord-

ing to the intent of the parties to the lease, as gathered from the whole instrument, and this may be said to be the recognized law in this country, *M' Glyn v. Butler*, 25 Cal. 384; *Donaldson v. Smith*, 1 Ashm. 197. It seems that in determining the intent the custom of the neighborhood may be taken into consideration; thus the Court, in *Wilcox v. Wood*, 9 Wend. 346, said that proof of a custom that a lease from May 1st of one year to May 1st of the next should expire at 12 M. on May 1st, would be admissible. In *Lysle v. Williams*, 15 S. & R. 136, the Supreme Court of Pennsylvania laid down the following rule: "That when the words *from the date* are made use of to denote the *terminus a quo*, an immediate interest is to pass, the date of the instrument is *inclusive*. And the reason of the rule is that when words of an equivocal meaning are made use of, and there is no index from which the intention of the party who used them may be gathered, the construction shall be made most advantageous for him in whose favor the instrument is made. The distinction is between the legal construction of the words *from the date* when used by way of *computation* and when used by way of *passing an interest*." The authorities are not at one as to the exclusion or inclusion of the first day in ordinary leases. In *Marys v. Anderson*, 2 Grant 446, S. C. 24 Pa. St. 272, a lease for one year from the 1st day of April was held to expire on March 31st of the succeeding year, and to the same effect is *Fox v. Nathans*, 32 Conn. 348; and in *People v. Robertson*, a lease from May 1st, 1856, to May 1st, 1862, was held to expire at midnight on April 30th, 1862. On the other hand, it has been held that a lease from a certain day does not begin until the succeeding day, *Atkins v. Sleeper*, 7 Allen 487. In Indiana, in *Layman v. Throp*, 11 Ind. 352, it was held that a lease of a year from March 1, 1855, expired March 1, 1856. And in Rhode Island it is held that a term of a year ends on the day corresponding to that on which it began, *Waters v. Young*, 11 R. I. 1; so also in North Carolina, *Vincent v. Corbin*, 85 N. C. 108.

A lease for three years, and so from three years to three years during the lifetime of the lessee, is a good lease for nine years, *Pleasants v. Claghorn*, 2 Miles 302.

A lease for one year, the tenant to have the premises for one year one month and twenty days longer, is a lease for one year, or for two years one month and twenty days, at the option of the lessee, *Chretien v. Doney*, 1 Comst. 419; and wherever there is an uncertainty as to whether the term is for a greater or less length, the option is that of the tenant, *Dann v. Spurrier*, 3 Bos. & P. 399; *Goodright v. Richardson*, 3 D. & E. 462; *Doe v. Dixon*, 9 East 15; *Fallon v. Robins*, 16 Tr. Ch. 422; unless the option is stated to be that of the landlord, or when the lease is made determinable

within a shorter time than the extent for which it is created "if both parties think fit," *Fowell v. Tranter*, 13 W. R. 145.

Termination by Collateral Event.

A lease may, however, be brought to an end at a time prior to the expiration of the period for which it was made; and first by the occurrence of some collateral thing which, by the contract between the lessor and lessee, it has been agreed shall have the effect of terminating the tenancy. Thus in *Munigle v. Boston*, 3 Allen 230, the agreement was that "if the lessor shall sell the house, or the city cut off the premises, the said tenant shall assent thereto, and shall do all repairs at his own expense." The city cut off or took a portion of the premises for its own purposes. It was held that the cutting off terminated the lease, and that the lessee could therefore recover no damages from the city. But in the absence of such a contract it seems that an interference with the possession of the tenant by the exercise by the State of the right of eminent domain, where a part only of the premises is taken, will not destroy the estate for years, or release the tenant from the operation of the conditions or covenants subject to which he holds it, *Parks v. Boston*, 15 Pick. 198, in which SHAW, C. J., said: "The lessee takes his term just as every other owner of real estate takes title, subject to the right and power of the public to take it, or a part of it, for public use, wherever the public necessity and convenience may require it. Such a right is no incumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment. The lessee then holds exactly what was granted him as a consideration of the reserved rent, which is the whole use and beneficial enjoyment of the estate leased, subject to the same right of eminent domain on the part of the public." And see *Patterson v. Boston*, 20 Pick. 159; *Schuylkill Co. v. Schmoele*, 57 Pa. St. 271; *Workman v. Mifflin*, 30 Id. 362; *Water Street*, 7 Phila. 457; *Foote v. Cincinnati*, 11 Ohio 408. The law is otherwise in Missouri, *Biddle v. Hussman*, 23 Mo. 597; *Kingsland v. Clark*, 24 Id. 24; and in New York by statute, *Gillespie v. Thomas*, 15 Wend. 464.

By Exercise of State of Right of Eminent Domain.

Where the State, however, takes the whole of the demised premises, there the entire subject of the grant being gone, it is said that the lease is at an end, Taylor, L. & T., § 519; Jackson & Gross, L. & T., p. 224.

By Eviction of Landlord.

The estate will be terminated if the landlord under whom the tenant holds is evicted by a superior title, *Wheelock v. Warschauer*, 34 Cal. 265; *Gore v. Stevens*, 1 Dana (Ky.) 201; but the mere fact that a superior title is outstanding will not have that effect, *Maverick v. Lewis*, 3 M'Cord 216; it will also be terminated by the enforcement of a mortgage whose lien is superior to the lease, *Fitzgerald v. Beebe*, 7 Ark. 310; *Simers v. Saltus*, 3 Denio 214; *Whalin v. White*, 25 N. Y. 462; *Cowdry v. Cort*, 44 Id. 382; *Burr v. Stenton*, 52 Barb. 377; *Gartside v. Outley*, 58 Ill. 210.

A question has arisen whether, when an estate for years, which is subject to a mortgage of the fee, is destroyed by the foreclosure of the mortgage, and upon a sale of the mortgaged premises a surplus remains in the hands of the officer making the sale, or in the registry of the Court, the lessor will be entitled thereto, or the lessee will be entitled to receive the fund, or so much thereof as will represent the value of his unexpired term? The matter came before a department of the Supreme Court of New York in *Burr v. Stenton*, 52 Barb. 377, in 1868, and the Court held that on the destruction of an estate for years by a sale under foreclosure proceedings upon a mortgage of the fee, the tenant had no right to any part of the surplus of the fund after paying the mortgage. The same question afterwards came before another department in *Clarkson v. Skidmore*, 2 Lans. 238, in 1869. There was very little difference between the facts of the cases, but in *Burr v. Stenton* the lease had been made a short time before the lessor acquired the title to the premises. The Court, in *Clarkson v. Skidmore*, declined to follow *Burr v. Stenton*, although it did not express dissent from it, but, treating it as decided upon the peculiar facts of the case, awarded the surplus to the lessee. Any one, however, reading the two cases will see that there is a decided conflict in principle between them. After the decision in *Clarkson v. Skidmore*, *Burr v. Stenton* came before the Court of Appeals, 43 N. Y. 462, and the decision of the lower Court was affirmed, but the Judges differed as to the reason of affirmance, GROVER, J., saying: "It is absurd to say that the estate of the lessee for the unexpired term specified in the lease was sold, for the reason that all the estate he ever had therein was defeasible upon and defeated by the sale on the foreclosure of the mortgage." PECKHAM, J., concurred with GROVER, J. CHURCH, C. J., concurred in the result, but on the ground that the lessor had no title at the time of the execution of the lease, and that it contained no covenant for quiet enjoyment. FOLGER, J., concurred with the Chief Judge. ALLEN and RAPALLO, JJ., took no part in the decision, and ANDREWS, J., was absent. It will thus be seen that the question may be regarded as an open one, so far as the decisions are concerned; but on principle it would seem that the

true doctrine would be that as the estate is utterly destroyed by the foreclosure, the lessee must look for relief, if he is entitled to any, to the covenants, express or implied, of his lease. It is true, GROVER, J., intimated that possibly in equity the surplus might be substituted for the land, and the lessee be entitled to the use thereof during the unexpired term; but even this must be taken with the qualification that the rent must also be paid, and theoretically the rent equals the annual value of the land; so where the question was to be simply upon the use and enjoyment of a sum of money, it would seem that what the lessee received with one hand he must pay back with the other. On the other hand, when the lessee takes his lease he knows that the mortgage is superior to his estate, he knows that its foreclosure will divest that estate, and he knows also that he has the right to protect his own possession by paying the arrears of interest upon the mortgage, or by taking up the incumbrance and setting off what he has paid against the rent due by him; knowing all this, if he is not content to protect himself by payment he must do so by covenants in the lease, and there can be no hardship if, when what he had reason to expect might take place does occur, he should be told to look to his covenants, and to recover upon them the damages which he has actually suffered by their breach.

It has been made a question whether there must be an actual eviction of the tenant in order to destroy the tenancy, and give him the right to his remedy on the lessor's warranty. It seems, however, that where there is an express warranty there must be a lawful eviction in some form before an action can be maintained, *Waldron v. M' Carty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 Id. 120; *Kent v. Welch*, 7 Id. 258; *Vanderkarr v. Vanderkarr*, 11 Id. 122; *Kerr v. Shaw*, 13 Id. 236; *Webb v. Alexander*, 7 Wend. 281; but it is otherwise where the warranty is the one implied from the mere letting, and there the lessee may have his action, even if only kept out of possession, without actual eviction, by one having a superior title, *Grannis v. Clark*, 8 Cow. 36; *Greenvault v. Davis*, 4 Hill 643. And in either case it is held that the tenant may give up possession to the superior claimant, thereby taking upon himself in a legal contest with his grantor the burden of showing the superiority of the claimant's title, *Hamilton v. Cutts*, 4 Mass. 349; *Stone v. Hooker*, 9 Cow. 154; *Greenvault v. Davis*, 4 Hill 643; *Simers v. Saltus*, 3 Denio 314.

A lease will be terminated by the sale of the premises for taxes, *Ferguson v. Etter*, 21 Ark. 160.

Duty of Tenant Served in Ejectment by Stranger.

Where the tenant is served with a summons in ejectment for the premises occupied by him, it is his duty to give notice to his landlord in time to

enable him to defend his title and his tenant's possession. This duty is enforced by statute in some of the States, and in some an especial penalty provided for its neglect. See Arkansas, Rev. Stat. (1874), § 4016, p. 730; California, Civil Code, § 6949; Pennsylvania, Act March 21, 1772, 1 Sm. Laws 370; Missouri, 1 Rev. St. (1879), Ch. 45, § 3071, p. 514; Wisconsin, Rev. Stat., Ch. 99, § 2197, p. 630; New York, 1 R. S. 748, § 27.

But unless the landlord has notice and an opportunity to defend his title, he is not bound by a judgment in ejectment against his tenant, *Read v. Allen*, 56 Tex. 176; and it has even been held that a judgment in ejectment against the tenant will not be conclusive against the landlord although he has had notice and refused to defend, *Bennett v. Leach*, 32 N. Y. S. C. 178.

Termination by Surrender.

The estate may be determined by a surrender accepted by the landlord. A surrender is thus defined: "A yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may be drawn by mutual agreement between them," Co. Litt. 337 b.

The operative words of an express surrender are "hath surrendered, granted and yielded up," Blackst. Com. Lib. 2, p. 326; but the form of words is not essential, *Greider's Appeal*, 5 Pa. St. 422; *Allen v. Jaquish*, 21 Wend. 628; as said by BELL, J., in the former of these two cases, "All that is requisite is the agreement and assent of the proper parties manifesting such an intent, followed by a yielding up of the possession to him who hath the greater estate."

Requisites of Surrender.

To make a good surrender, the surrenderor must be in possession, and the surrenderee must have a higher estate than the surrenderor, Blackst. Com., Id.

A question arises under the Statute of Frauds, to wit: can a surrender of a written lease be made by parole merely? It has been held that since the statute a surrender of a lease can be legally made only by deed or note in writing, or by act and operation of the law, and that a parole surrender is void, *Hesseltine v. Seavey*, 16 Me. 212; *Wilson v. Lester*, 64 Barb. 431; *Rowan v. Lytle*, 11 Wend. 617; *Kittle v. St. John*, 7 Neb. 73; but it would seem that in all cases where the term granted by the lease is one which could have been created by parole, then, although it has in fact been created by deed, it may be surrendered by parole, *Kiester v. Miller*, 25 Pa.

St. 481; *M'Kinney v. Reader*, 7 Watts 123; *Vreider's Appeal*, *supra*; *Magraw v. Lambert*, 3 Pa. St. 444. In *Peters v. Barnes*, 16 Ind. 219, it was held that a lease under seal for less than three years could be well surrendered by a writing not under seal; and in *Auer v. Penn*, 92 Pa. St. 444, 8 W. N. C. 277, the Supreme Court of Pennsylvania held that a surrender of a term of more than three years might be made by a parole agreement of the parties followed by a delivery and acceptancy of possession. And see *M'Kensie v. Lexington*, 4 Dana 129; *Beidler v. Fish*, 14 Brad. 623.

Surrender may be Contingent.

The surrender of an estate for years may be contingent or made upon condition, and if the condition fails the term will revive, *Allen v. Jacquish*, 21 Wend. 628; *Whitney v. Meyers*, 1 Duer 266; and it may be made to take effect *in futuro*, *Allen v. Jacquish*, *supra*.

Consideration for Agreement to Surrender.

An agreement to surrender may be sustained with no consideration other than the contract itself, *Kiester v. Miller*, 25 Pa. St. 481; but a mere executory agreement will not have the effect of a surrender, *Lammott v. Gist*, 2 H. & G. 433; *Lamar v. M'Namee*, 10 G. & J. 124; and see *Scheiffelin v. Carpenter*, 15 Wend. 400; *Smith v. Brannan*, 13 Cal. 107; and where permission is given to surrender without any consideration, it may be revoked before it is acted upon, *Dunning v. Mauzy*, 49 Ill. 368.

Surrenders by Operation of Law.

Besides express surrenders, or surrenders in deed, there are also surrenders by operation of law. Thus where one in possession of premises accepts from his landlord a new lease, or by his assent a new lease is made to a third person by the landlord, for the whole or a portion of the time embraced in the former lease, it is surrendered by operation of the law, *Scheiffelin v. Carpenter*, 15 Wend. 400; *Smith v. Mivers*, 2 Barb. 180; *Livingston v. Potts*, 16 Johns. 28; *Scott v. Hawsman*, 2 McL. 180; *Donkersley v. Levy*, 38 Mich. 54; the new lease may be by parole, *Smith v. Nivers*, *supra*; *Whitney v. Meyers*, 1 Duer 266; but to operate as a surrender it must be a valid one, and sufficient to vest in the new tenant the term it assumes to grant, *Whitney v. Meyers*, *supra*; *Bedford v. Terhune*, 30 N. Y. 453; *Coe v. Hobby*, 72 Id. 141; thus it was held in *Scheiffelin v. Carpenter*, *supra*, that where the second lease was void under the Statute of Frauds, it could

not have the effect of a surrender, although possession under it was given to a third person with the assent of the tenant.

While the rule as above stated is of general application, still there are cases in which the circumstances are such as to show that the intent of the parties to the new lease was not that the old one should be regarded as surrendered, *Flagg v. Dow*, 99 Mass. 18, and see *Abell v. Williams*, 3 Daly 17.

The acceptance by the tenant of a new lease will destroy his right to all privileges granted by the old one which are not regranted by the new, *Livingston v. Potts*, 16 Johns. 28.

A mere reduction of rent is not equivalent to taking a new lease, so as to work a surrender, *Coe v. Hobby*, 72 N. Y. 141.

A surrender by operation of law may be inferred from the acts of both parties to the lease, *Clemens v. Broomfield*, 19 Mo. 118; as where the tenant having sublet the premises for the whole term, the landlord receives possession of the sub-leases, directs the sub-tenants to pay their rent to him, and afterwards collects the rent, *Bailey v. Delaplaine*, 1 Sand. Sup. Ct. 5; or where the lessor agrees to accept a third person as his tenant instead of the lessee, and the latter gives up the possession, *Whitney v. Meyers*, *supra*; *Logan v. Anderson*, 2 Dougl. 101; *Lamar v. M'Namee*, 10 G. & J. 124; but the mere receipt by the landlord of rent from the sub-tenant of one who has abandoned possession of premises is not evidence of the assent of the landlord to the abandonment, *Slacum v. Brown*, 5 Cr. C. C. 315; and see *Bacon v. Brown*, 9 Conn. 334; and even if the landlord relet the abandoned premises, this will not be conclusive evidence of an assent, for the reletting may be for the benefit of the tenant, *Meyer v. Smith*, 33 Ark. 627; and see *Pier v. Carr*, 69 Pa. St. 326; *Re Orne, Son & Co.*, 13 Reporter 714. In *Wood v. Walbridge*, 19 Barb. 136, the circumstances were as follows: H. leased to A. certain premises for eight years, from April, 1844, giving him possession prior thereto. In February, 1844, the premises were burned, A. abandoned possession, and requested cancellation of the lease, alleging that there was a verbal agreement that it should be cancelled. H. refused, but in July entered on the premises and began the erection of valuable improvements. A. made no claim to the premises until the improvements were completed. The Court held that the acts constituted a surrender in law.

An actual surrender of possession to the landlord, who accepts and leases the premises to another, will be equivalent to a surrender of the term, *Witman v. Watry*, 31 Wisc. 638; *Hanham v. Sherman*, 114 Mass. 19.

Where an absconding debtor abandons premises, the landlord may, if he so desires, treat the mere abandonment as a surrender, *M'Kinney v. Reader*, 7 Watts 123.

Where the tenant agrees to purchase the demised premises from one who has bought them from the landlord, and by the agreement a conveyance is to be made later, and in the meantime the tenant is to pay rent at the same rate he paid to the former landlord, the transaction amounts to a surrender, *Denison's Executors v. Wertz*, 7 S. & R. 373; but a mere executory agreement that the landlord shall prosecute an action to settle the title to demised land, and that when settled the tenant may purchase it, does not amount to a surrender of the term, *Smith v. Brannan*, 13 Cal. 107.

The mere removal from the premises and the delivery to the landlord of the keys thereof, even if he retain them, and do not tender them back, do not constitute a surrender of the demised premises, *Prentiss v. Warne*, 10 Mo. 601; *Thomas v. Nelson*, 69 N. Y. 168; *Ladd v. Smith*, 6 Oreg. 316; to raise any presumption of surrender there must be an acceptance of the keys by the landlord, *Bacon v. Brown*, 9 Conn. 334; and the acceptance itself may be deprived of the effect of raising such presumption by the action or speech of the landlord at the time, as where he says that he receives the key but not the premises, *Townsend v. Alberz*, 3 E. D. Sm. 560, or expressly declares that he will hold the lessees for the rent, *Nelson v. Thompson*, 23 Minn. 508; *Auer v. Penn*, 11 W. N. C. 213, S. C. 99 Pa. St. 370. When the keys are delivered to the landlord in pursuance of a request by him and are accepted by him a surrender will be presumed, *Reaney v. Fannessy*, 14 W. N. C. 91.

The acceptance of the key without explanation, followed by acts of dominion exercised by the landlord, and a reletting by him, will have the effect of an accepted surrender, *Ladd v. Smith*, 6 Oreg. 316. In *Randall v. Rich*, 11 Mass. 494, the tenant held by a lease under seal, the landlord put a third person in possession of the premises, and the tenant delivered the key to the landlord. In an action by the tenant against the landlord, it was held that this conduct put an end to the term, whether the delivery of the key were considered as a surrender, or the putting the third person in possession as an ouster, by the landlord.

In *Dos Santos v. Hollinshead*, 4 Phila. 57, it was held that while the mere reception of the key would not be equivalent to an acceptance of a surrender, yet if the landlord afterwards used the key as his own, giving it to the tenant to enable him to make repairs rendered necessary by injuries done while the premises were in the tenant's possession, and taking it back when the repairs were finished, the jury might find that there was an accepted surrender; but where the key was not delivered by the tenant, but handed to the landlord by a constable who made a levy for taxes, there, although before the tax sale the tenant left the premises, and the landlord entered thereon, made repairs, and endeavored to relet the premises, it was

held that there was no surrender, *Pier v. Carr*, 69 Pa. St. 326; and it may be said, generally, that the mere attempt to relet premises under such circumstances, or even their reletting, will not discharge the tenant from liability on his lease, *Bruckman v. Twibill*, 89 Pa. St. 58.

The acceptance of the key, followed by the putting in of another tenant, has been held to be acceptance of a surrender, where the tenant at the time of delivering the key asked the landlord if he would take the lease back and let certain other persons into possession, and the copies of the lease were retained and showed no apparent cancellation, *Hesseltine v. Seavey*, 16 Me. 212. For other instances of circumstances used to show *quo animo* the key of demised premises is given or received, see *Hegeman v. M'Arthur*, 1 E. D. Sm. 147; *Sharpless v. Weigle*, 7 W. N. C. 376; *Bradley v. Brown*, 6 Id. 282.

While the surrender of the tenant brings to an end any tenancy he has created under him, it leaves the rights of action by the subtenants against him unimpaired, *McKenzie v. Lexington*, 4 Dana 129.

Forfeiture of Lease.

The term may be brought to a premature conclusion by forfeiture where the tenant violates the conditions, express or implied, of the lease, and upon which he holds his estate.

By Disclaimer, Disseizin, or Adverse Attornment at Landlord's Election.

Disclaimer, disseizin, or attornment to an adverse claimant will work a forfeiture at the landlord's election, *Wall v. Goodenough*, 16 Ill. 415; *Fortier v. Ballance*, 10 Id. 41; *Jackson ex d. Van Schaick v. Vincent*, 4 Wend. 633.

The better opinion seems to be that a mere parole disclaimer will not cause a forfeiture. See *De Lancey v. Ganong*, 9 N. Y. 9, in which case DENIO, J., referring to the contrary opinion of SAVAGE, C. J., in *Jackson v. Vincent*, said: "As to the first position the Chief Justice refers to 4 Cruise's Digest, Tit. 32, Ch. 26, § 2. On looking into the book it will be seen that the passage is inaccurately cited, and that it refers to a different branch of the law, namely, disclaimer and disagreement by which one may divest himself of an estate which is attempted to be vested in him against his will."

Where the landlord sells his reversion to a third person, and enters into an obligation to convey the same, and the lessee accepts a lease from such third person, he is not guilty of such an act of disclaimer as will work a forfeiture, *Allison v. Thompson*, 1 Litt. 31.

By Conveyance by Lessee in Fee.

At common law a conveyance in fee by the tenant would cause a forfeiture of his estate, but such conveyance must have been by feoffment and livery of seizin; and a conveyance by lease and release, or bargain and sale, or by any other method operating by way of a grant, would not work a forfeiture, but would pass only the estate which the tenant might legally convey, *Griffin v. Fellows*, 81½ Pa. St. 114; Co. Litt. 251 b.

The matter has been regulated by statute in many of the States, and the statutes generally declare that conveyance by a tenant for years purporting to give a greater estate than he can lawfully convey shall not work a forfeiture, but shall be held to pass the estate which he might lawfully confer. Massachusetts, Rev. St. (1882), Ch. 126, § 7, p. 744; Wisconsin, Rev. St. (1878), § 2202, p. 631; Kentucky, Gen. Stat. (Bullitt & Feland, 1881), Ch. 66, Art. I., § 1, p. 600; Alabama, Code (1876), § 2196, p. 573; Vermont, Rev. Laws (1880), § 1918, p. 397; and the law in States in which no statute has been passed will, it is presumed, be held in accordance with the spirit of the above legislation; in those States, however, where the assignment, or subletting by the tenant, is a cause of forfeiture, it is presumed that, in the absence of a statute to the contrary, a conveyance would likewise work a forfeiture.

Refusal to Attorn to Heir.

A refusal to attorn to the heir-at-law of the landlord is a cause of forfeiture, *Sampson v. Shaeffer*, 3 Cal. 196.

Nonpayment of Rent.

Nonpayment of rent reserved may be a cause of forfeiture, but to give it this effect it is necessary that there be a clause giving a right of reëntry upon such failure in the lease, *De Lancey v. Ganong*, 9 N. Y. 9; *Vanatta v. Brewer*, 32 N. J. Eq. 268.

In Georgia, however, nonpayment of rent is made a statutory cause of forfeiture, Code (1882), § 2285.

Subletting or Assignment.

A common cause of forfeiture reserved is the subletting or assignment of the demised premises. Upon this subject, see *supra*, p. 88.

Failure to Insure.

Where there is a provision for a forfeiture in case the tenant do not insure, he does not save his estate by covenanting with an under lessee that he shall insure the premises, *Keteltas v. Coleman*, 2 E. D. Sm. 408.

Scienter Requisite to make Forfeiture in Certain Cases.

When the cause of forfeiture is the doing, or permitting to be done, on the premises certain prohibited acts, it seems that to work a forfeiture where such acts have been done on the premises, the consent or knowledge of the tenant must be shown, *O'Connell v. M'Grath*, 14 Allen 289.

Statutory Causes of Forfeiture.

A common statutory cause of forfeiture is the use of a demised house for the purposes of prostitution, Nebraska, Comp. Stat., p. 698, §§ 210, 211; New York, Rev. Stat. (1882), p. 2539, § 29; Maine, Rev. Stat. (1871), Tit. II., Ch. 17, §§ 1, 3, p. 230; and see Tit. XI., Ch. 124, § 12, p. 850; Massachusetts, Rev. Stat. (1882), Ch. 207, § 14, p. 1161; and see Ch. 101, § 8, p. 538; Michigan, How. Ann. Stat. (1882), § 9287; Minnesota, Ch. 100, § 10, p. 920; Wisconsin, Rev. St. (1878), Ch. 186, § 4589, p. 1082; Tennessee, Statutes (1871), § 4846; Kansas, Com. Laws (1879), § 1993, p. 362; Iowa, § 4014, p. 1011; Rhode Island, Rev. Stat. (1819), Ch. 80, § 14; Connecticut, Rev. Gen. St. (1875), T. 19, Ch. 17, § 7, p. 492; or for the illegal sale or keeping of liquors, Maine, Massachusetts, Minnesota, Rhode Island, *supra*. In Vermont a lease is forfeited by the use of the premises as a saloon where intoxicating liquor is unlawfully sold or given away, Rev. Laws (1880), § 3842, p. 743; and in Ohio the unlawful selling or giving away of liquor is a cause of forfeiture, Rev. Stat. (1880), § 4361, p. 1089. In Rhode Island, Vermont, Kansas, and Connecticut, the use of the premises for gambling; and in Ohio for a lottery, Rev. Stat. (1880), § 4276, p. 1073, are causes of forfeiture. Under the Massachusetts, Minnesota, Tennessee, and New York statutes, the conviction of the lessee is made a condition of the forfeiture. And it is held in Maine that where a conviction of the lessee is relied on as proof that a forfeiture of the term has been incurred, there must be proof that the sale of which he was convicted was on the premises, and it is not enough to show that he has been convicted of being a common seller of liquor, *Machias Hotel Co. v. Fisher*, 56 Me. 321. When the sale of liquor is made upon the premises by an undertenant, without the knowledge of the tenant, his lease is not forfeited, *O'Connell v. M'Grath*, 14 Allen 289; *Hazley v. Trant*, 15 Gray

312; but it is if the sale is with knowledge and he makes no effort to prevent it, *Prescott v. Kyle*, 103 Mass. 381. The effect of the Rhode Island statute is declared to be that the use of the premises for any of the prohibited purposes does not *ipso facto* avoid the lease, but gives the lessor the right to avoid it if he shall so elect, *Almy v. Greene*, 13 R. I. 350.

In New York, by the Revised Statutes (1882), p. 2204, Act 1873, Ch. 583, § 1, it is provided that the use of demised premises for any illegal trade will avoid the lease. In general it may be said that even without a statute the use of premises for an immoral purpose will avoid the lease, at the option of the landlord, who cannot be presumed to have parted with the possession of his property for the purpose of violating the law. Where, however, the use to which the premises are put is one which is simply *malum prohibitum*, and not *malum in se*, it may be questionable whether, in the absence of a statute avoiding a lease in such case, or a covenant in the lease forfeiting it in such case, the landlord, not being specially injured, could declare the lease at an end.

Steps Necessary to take Advantage of Forfeiture must be Strictly Followed.

Forfeiture being odious to the law, before a landlord can avail himself of his right to forfeit the estate for years he has granted, he must perform every act necessary upon his own part; thus to avail himself of his right of reëntry for nonpayment of rent, he must make the proper demand for the payment of rent with great particularity as to time and place of demand, *Philips v. Doe ex d. Tucker*, 3 Ind. 132; *M'Glynn v. Butler*, 25 Cal. 384; *Woodward v. Cone*, 73 Ill. 241; *Bacon v. Western Furniture Co.*, 53 Ind. 229; *Kansas City Elevator Co. v. Union Pacific R'y Co.*, 3 McCrary 463; and see *Jackson v. Harrison*, 17 Johns. 66; the demand must be made of the precise amount of rent due, on the day it falls due, at a convenient time before sunset, and on the premises demised, see cases *supra*. In Colorado it is otherwise by statute, and there demand may be effectually made at any time after the rent falls due, Gen. Laws (1877), § 1234. Where the condition is that the tenant shall pay taxes, the landlord must show a demand upon the proper person that he should make such payment, *Meni v. Rathbone*, 21 Ind. 454.

The mere violation of a condition by the tenant will not of itself work a forfeiture, the landlord must exercise his option to forfeit; *Planters' Insurance Co. v. Diggs*, 8 Baxt. 563; *Rogers v. Snow*, 118 Mass. 118; *Walker v. Engler*, 30 Mo. 130; and where a special way of declaring the forfeiture is prescribed in the lease that way must be strictly followed, thus where a

lease of town lands provided that the town trustees might declare a forfeiture by a resolution entered of record amongst the acts and proceedings of the town, it was held the lease was not forfeited by a resolution not of record, *Lewis v. St. Louis*, 69 Mo. 595, and to the same effect, see *Graham v. Carondelet*, 33 Id. 262; *Carondelet v. Wolfert*, 39 Id. 312. Where a lease reserves the right to terminate the estate by entry, a notice is not sufficient, *Gage v. Smith*, 14 Me. 466.

Lease may be so Drawn that Certain Acts will per se Work a Forfeiture.

A lease may, however, be so drawn that certain acts or omissions on the part of the tenant will work a forfeiture, although the landlord do not manifest his intention to take advantage of the forfeiture, by any positive act, *Davis v. Moss*, 38 Pa. St. 346.

Waiver of Forfeiture.

Forfeiture may be waived by the landlord, and it is said, very slight acts upon his part will be sufficient to amount to a waiver, *Gainhart v. Finney*, 40 Mo. 449. Thus if the landlord receive rent accruing after the act of forfeiture, the forfeiture is waived, *Jackson ex d. Blanchard v. Allen*, 3 Cow. 229; *Jackson v. Sheldon*, 5 Id. 448; *Walker v. Engler*, 30 Mo. 130; *Gainhart v. Finney*, 40 Id. 449; *Bleecker v. Smith*, 13 Wend. 530; *Richburg v. Bartley*, 1 Busbee Law 419; *Watson v. Fletcher*, 49 Ill. 498; but to render this receipt a waiver the landlord must know at the time he receives the rent that a forfeiture has been incurred, *Jackson v. Brownson*, 7 Johns. 234; *Jackson v. Shultz*, 18 Id. 174; *Clarke v. Cummings*, 5 Barb. 359; *M'Kildoe's Ex'r v. Darracott*, 13 Gratt. 278; *Keeler v. Davis*, 5 Duer 507; *Gomber v. Hackett*, 6 Wisc. 323; and the knowledge of the landlord may be inferred from accompanying facts, as where, after bringing suit for a breach, he afterwards accepts rent, *Gomber v. Hackett*, 6 Wisc. 323; the acceptance of rent may, however, be so explained that it will not operate as a waiver, *Jones' Devisees v. Roberts*, 3 Hen. & M. 436.

A distraint for rent will have the same effect as a receipt of rent, *Jackson ex d. Norton v. Sheldon*, 5 Cow. 448; and as this waiver is based on the common law doctrine that a distress can be made only while the relation of landlord and tenant continues, *Pennant's Case*, 3 Co. 64, it is immaterial whether the rent distrained for accrued before or after the act of forfeiture. But it is submitted that this rule will not apply in States where, as in Pennsylvania, Act 21 March, 1772, § 14, Pur. Dig. 876, pl. 1, the landlord may distrain after the expiration of the term, for as there the

right of distress exists after the expiration, its exercise can certainly raise no presumption that the term still continues.

Moving for a receiver of rents will not waive a forfeiture where an action has been instituted to recover the demised premises, *Ireland v. Nichols*, 37 How. Pr. 222.

In *Coon v. Brickett*, 2 N. H. 163, the doctrine of waiver by receipt of rent was carried very far. The lease in that case contained a provision for a reëntury for nonpayment of rent. The rent fell in arrears. The lessor reëntered, and afterwards received the rent in arrear. The Court held the forfeiture waived, *WOODBURY, J.*, saying: "It is unjust that the lessor should receive both the penalty and the rent; or, in other words, should accept the performance of the condition and retain also the forfeiture for its nonperformance. In this case the voluntary receipt of the rent in arrear, after a mere formal entry, was a receipt of that for which he entered, and may therefore well be deemed an assent to the term, or abandonment of the entry and a continuance of the lease." It may be noted, however, that in *Coon v. Brickett* the Court dwelt on the fact that the entry was a formal one, and also that the report shows that the landlord made no formal proper demand for rent, although the Court did not allude to that fact in its opinion.

Forfeiture is not waived by suffering the tenant to continue in possession without notice to quit, except under circumstances from which the Court might draw the inference of a new agreement, *Calderwood v. Brooks*, 28 Cal. 151.

Where the cause of forfeiture is a continuing one, the mere neglect to enforce it promptly does not constitute a waiver, nor does the receipt of rent, and the forfeiture may be enforced at any time prior to compliance with the condition whose nonperformance is the cause of forfeiture, *Alexander v. Hodges*, 41 Mich. 691; *Manice v. Millen*, 26 Barb. 41. And see *M'Kildoe's Ex'r v. Darracott*, 13 Gratt. 278; *McGlynn v. Butler*, 25 Cal. 384. In *Conger v. Duryee*, 31 N. Y. Sup'r C. 617, the cause of forfeiture was the nonpayment of taxes; after the taxes were due the lessor accepted rent; it was held that this was not a waiver, and that if the taxes were not paid within a reasonable time, the lessor might proceed to forfeit the term.

But this case was reversed on appeal, 90 N. Y. 594, the Court of Appeals, by *TRACY, J.*, saying: "It is apparent that the acceptance of the rent, with knowledge of the nonpayment of the taxes, waived the forfeiture and affirmed the lease. The plaintiffs did not thereby release their claim against the lessee for the taxes; he is still liable in an action upon his covenant to pay; but they did waive their right to re-enter for such non-

payment, and as to such breach the lease stands as it would have stood had it contained a covenant to pay without the right to re-enter for non-payment."

Relief against Forfeiture.

Forfeiture may be relieved against in equity, *Wilson v. Jones*, 1 Busb. 173; *Garner v. Hannah*, 6 Duer 262. In *Woodson v. Skinner*, 22 Mo. 13, it was held that while relief would be extended in cases where the cause of forfeiture was one made such by the contract of the parties, it would not when the forfeiture was imposed by statute. When the cause of forfeiture is the nonpayment of rent, and the landlord has acquiesced in numerous dilatory payments by the tenant, so as to create in him an expectation that prompt payment will not be insisted upon, equity will not permit the landlord, without notice to the tenant, to suddenly straighten the lines, and enforce a forfeiture upon the rent falling in arrears, *Thropp v. Field*, 26 N. J. Eq. 82; *Wanamaker v. McCaully*, 11 W. N. C. 450; *Cogley v. Browne*, Id. 224; but the tenant may lose his equity by actions upon his part which would lead the landlord to believe that he intended to disregard any course of dealing previously established between them, and to hold the landlord to the strict letter of the contract in other respects, *Times Company v. Siebrecht*, 11 W. N. C. 283.

Holding Over.

Where, after the termination of the time fixed by a lease, the tenant holds over, the landlord may, if he choose, consider him a trespasser, *Decker v. Adams*, 7 Hals. 99; *M'Kay v. Mumford*, 10 Wend. 351; *Fitzpatrick v. Childs*, 2 Brews. 365; *Logan v. Herron*, 8 S. & R. 468; *Benfey v. Congdon*, 40 Mich. 283; *Schuyler v. Smith*, 51 N. Y. 309; *Smith v. Allt*, 4 Abb. N. C. 205; *Ives v. Williams*, 50 Mich. 100.

Statutory Penalties for Holding Over after Demand.

In Missouri, 1 Rev. St. (1879), § 3074, p. 514; New Jersey, Stew. Rev. (1877), p. 575, pl. 25; Mississippi, Rev. Code (1880), § 1331, p. 382; Delaware, Rev. Code, Ch. CXX., § 5, p. 707; New York, Rev. Stat. (1882), p. 2202, § 11; Illinois, Rev. Stat. (Cochran, 1880), p. 915, § 2, the tenant holding over after a lawful demand of possession is liable to pay double rent; in California, Civil Code, § 8345, to pay treble rent. In California and New York there must be demand and one month's notice. In New Jersey, Oregon, and California, it is specified that the notice must be in

writing. In Iowa, a tenant holding over after receiving notice to quit at the end of his term, is liable to pay the double rental value of the premises, M'Clain's Annot. Stat. (1880), § 2012, p. 568. In Kentucky, the tenant who refuses to quit at the expiration of his term is subject to double rent, Gen. Stat. (Bullitt & Feland, 1881), Ch. 66, Art. 1, § 3, p. 600. In Georgia, a tenant holding over is subject to double rent, Code (1882), §§ 4077, 4081.

In Missouri, Rev. St. (1879), § 3072; New York, Rev. Stat. (1882), p. 2201, § 10; Iowa, Mississippi, Kentucky, *supra*; California, Civil Code, § 8344; Illinois, Rev. Stat. (Cochran), p. 915, § 3, the same consequences follow when the tenant holds over after having himself given notice of intention to quit, as when the notice comes from the landlord.

In Colorado, Gen. Laws (1877), § 1233; and Maine, Rev. Stat. (1871), Ch. 94, § 1, p. 729, holding over after the expiration of the term is deemed unlawful detainer, but in the latter State proceedings must be begun for that cause within seven days after the expiration of the term. In Delaware, Rev. Code, Ch. CI., § 14, p. 630; and Oregon, Gen. Laws (1872), p. 615, §§ 11, 12, the tenant holding over after written notice to quit is guilty of forcible detainer.

Election to Consider Tenant Holding Over a Trespasser rests Exclusively with the Landlord.

The election to consider the tenant a trespasser belongs to the landlord only, and if he do not so elect, the tenant who holds over, even for a short time, without any unequivocal act at the time the holding began to give it the character of a trespass, cannot deny that he is in possession as a tenant of the landlord, *Conway v. Starkweather*, 1 Denio 113; *Schuyler v. Smith*, 51 N. Y. 309.

Effect of Landlord's Election not to Consider Holding Over a Trespass.

The landlord is not bound to consider the tenant holding over as a trespasser, and if he do not, the latter will be regarded as remaining in possession by the landlord's assent, and subject to those terms and covenants of the lease which are applicable to his present condition, *Phillips v. Monges*, 4 Whart. 226; *Laquerenne v. Dougherty*, 35 Pa. St. 45; *Quinette v. Carpenter*, 35 Mo. 502; *Dorrill v. Stephens*, 4 M'Cord 59; *Frontz v. Wood*, 2 Hill (So. Car.) 367; *Hunt v. Bailey*, 39 Mo. 257; *Adrianee v. Hafkenizer*, Id. 134; *Harkins v. Pope*, 10 Ala. 493; *De Young v. Buchanan*, 10 G. & J. 149; *Hunt v. Wolfe*, 2 Daly 298; *Jennings v. Alexander*, 1 Hilt. 154; *Pierce v. Pierce*, 25 Barb. 243; *Hall v. Southmayd*, 15 Id. 32; *Williams v.*

Sherman, 7 Wend. 109; *Clapp v. Noble*, 84 Ill. 62; *Prickett v. Ritter*, 16 Id. 96; *McKinney v. Peck*, 28 Id. 174; *Otto v. Jackson*, 35 Id. 349; *Parker's Adm'r v. Hollis*, 50 Ala. 411; *Gardner v. Board of County Commissioners of Dakota*, 21 Minn. 33; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Hunt v. Morton*, 18 Id. 75; *Wolz v. Sanford*, 10 Bradw. 136; *Tolle v. Orth*, 75 Ind. 298; *Rothschild v. Williamson*, 83 Id. 387; *Bacon v. Brown*, 9 Conn. 334; *Sears v. Smith*, 3 Col. 287; *Webber v. Shearman*, 3 Hill 547; *Salisbury v. Hale*, 12 Pick. 416; *Finney's Trustees v. St. Louis*, 39 Mo. 177, and for such time as the local custom or statute of each State may determine, which matter will be found treated below. This will be the case entirely irrespective of the intent of the tenant in remaining in possession, *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Conway v. Starkweather*, 1 Denio 113; *Witt v. Mayor, etc., of New York*, 6 Robt. 441.

Variation of Terms of Lease may be Shown in Case of Holding Over.

A variation in the terms upon which the tenant is to remain in possession from those of the lease may, however, be shown, *Jackson v. Patterson*, 4 Harring. 534; and where a notice is given notifying the tenant that if he holds over a certain variation in the terms of the holding will be made, and the tenant holds over, his assent to the variation will be presumed, *Hunts v. Bailey*, 39 Mo. 257; *Witte v. Witte*, 6 Mo. App. 488; *Brinkley v. Walcott*, 10 Heisk. 22; *Despard v. Walridge*, 15 N. Y. 374; *Gardner v. Board of County Commissioners*, 21 Minn. 33; *Griffin v. Knisely*, 75 Ill. 411; *Reithman v. Brandenburg* (Supreme Court of Colorado, Oct. 1, 1884), 4 Pac. Rep. 788. This has been held in the case of an increased rent, even where the tenant said the rent was "too high," but continued in possession after expiration of the lease, *Brinkley v. Walcot, supra*, but in *Galloway v. Kerby*, 9 Bradw. 501, the First District Appellate Court in Illinois held that where the tenant dissented to the increase of rent and remained in possession, the rent fixed by the lease would continue to rule, and McALLISTER, J., distinguished the case from *Griffin v. Knisely* on the ground that in the last-named case the tenant objected to the increased rent, and after an attempt to get him to take a new lease continued to occupy the premises.

A new lease, although void under the Statute of Frauds, may be good evidence to explain a holding over, and to show that it was not upon the terms of the original lease. *Crommelin v. Thiess*, 31 Ala. 412.

Terms of Lease may be such as Prevent Retention of Possession, being an Ordinary Case of Holding Over.

The terms of the lease itself may be such as to prevent the retention of possession of the demised being considered an ordinary holding over. Thus, when the lease confers on the tenant a privilege of extending the term for a definite number of years, on the expiration of the years originally granted, the remaining in possession after said expiration will be regarded as an election to keep the premises for the further term, *Montgomery v. Board of Commissioners of Hamilton County*, 76 Ind. 362; *Delashman v. Berry*, 20 Mich. 292; *Testegge v. First German Mutual Benevolent Society*, 92 Ind. 82. When the provision is that the lessee may have the premises for a longer term if the lessor consent, then the holding over without any objection on the part of the lessor will show the election of both tenant and landlord that the premises shall be retained for the new term, *Vetter's Appeal*, 99 Pa. St. 52. But cases of both the above mentioned classes must be distinguished from those in which the privilege conferred by the lease is to rent for a new term, or in which there is a covenant for a renewal; in either of the cases the mere holding over is not a sufficient announcement of election, but the election must be made otherwise, *Thiebaud v. First National Bank of Vevay*, 42 Ind. 212; *Renoud v. Daskam*, 34 Conn. 512; and see *Huger v. Dibble*, 8 Rich. 222. The reason for the distinction is, that in the latter cases the instrument creating the original term contemplates the execution of some further instrument to vest the new term, while in the former nothing more is contemplated than the continuance of a possession already commenced. Where the tenant is given by the lease the privilege of extending his term, and the lease specifies the method in which he shall manifest his election to avail himself of the privilege, a mere holding over will not be regarded as a manifestation of an election to retain the premises for the extended term. See *Beller v. Robinson*, 50 Mich. 264.

Landlord Entitled to a Reasonable Time to Decide whether he will Regard Tenant who Holds Over as a Trespasser.

The landlord is entitled to a reasonable term within which to make his election whether he will treat the tenant holding over as a trespasser or as a tenant. *Den ex d. Decker v. Adams*, 7 Hals. 99; *Smith v. Littlefield*, 51 N. Y. 539. In Maine, as we have seen, the election must be made within seven days from the expiration of the term; in Kentucky, if the landlord do not institute proceedings against the tenant within ninety

days, the tenant may retain possession for a year from the time of the expiration of the tenancy, at which time he must leave without notice. Gen. Stat. (Bull. & Fel. 1881), Ch. 66, Art. IV., § 1.

Acceptance of Rent as Manifesting Assent to Holding Over.

Acceptance of rent accruing after the expiration of the term is in general conclusive evidence of the landlord's assent to the holding over, *Den ex d. Decker v. Adams*, 7 Hals. 99; *Gilman v. Milwaukee*, 31 Wisc. 563; but this acceptance may be explained, and if made under a misapprehension of fact, will not determine the landlord's election. *Fitzpatrick v. Childs*, 2 Brews. 365.

Character of Tenancy which Tenant Holds Over by Consent.

The character of the tenancy which vests in the tenant who holds over by the consent of his landlord is different in different parts of the country. At common law the tenant holding over became a tenant by sufferance, and such was formerly the law in California, *Mahe v. Reynolds*, 38 Cal. 560; *Hauxhurst v. Lobree*, Id. 563; but by the Civil Code it is provided that if the tenant hold over and the lessor accept rent, the lease is extended for not over one month, if the rent is payable monthly, and in any case not over one year, Civil Code, § 6945. The tenant holding over is a tenant at will in Massachusetts, *Ellis v. Paige*, 1 Pick. 43; Maine, *Bennock v. Whipple*, 12 Me. 346; *Kendall v. Moore*, 30 Id. 327; Michigan, see *Benfrey v. Congdon*, 40 Mich. 283; from year to year in Pennsylvania, *Phillips v. Monges*, 4 Whar. 226; *Laguerenne v. Dougherty*, 35 Pa. St. 45; New Jersey, *Den ex d. Decker v. Adams*, 7 Hals. 99; New York, *Jackson ex d. Wood v. Salmon*, 4 Wend. 327; *McKay v. Mumford*, 10 Id. 351; *Witt v. Mayor, etc., of New York*, 5 Roberts. 248, 6 Id. 441; *Park v. Castle*, 19 How. Pr. 290; *Schuyler v. Smith*, 51 N. Y. 309; *Smith v. Allt*, 4 Abb. N. C. 205; Delaware, *Jackson v. Patterson*, 4 Harring. 534; Alabama, *Harkins v. Pope*, 10 Ala. 493; *Ames v. Schuesler*, 14 Id. 602; Minnesota, *Gardner v. Board of County Commissioners*, 21 Minn. 33; Illinois, *Prickett v. Ritter*, 16 Ill. 96; *Hunt v. Morton*, 18 Id. 75; Maryland, *Hall v. Myers*, 43 Md. 446; North Carolina, *Stedman v. McIntosh*, 4 Ired. Law 291; Oregon, *Williams v. Ackerman*, 8 Oreg. 405; Indiana, *Tolle v. Orth*, 75 Ind. 298; Wisconsin, *Koplitz v. Gustavus*, 48 Wisc. 48; *Brown v. Kayser*, 18 N. W. Rep. 523. In Tennessee, if the term for which the lease is made is a year or more, holding over will be deemed to create a tenancy from year to year; if for a shorter time, the holding over will create a term of like

extent with that created by the original instrument, *Noel v. McCrorytal*, 7 Coldw. 623. The same rule as to terms of less than a year prevails in Illinois, *McKinney v. Peck*, 28 Ill. 174; *Clapp v. Noble*, 84 Id. 62; *Field v. Herrick*, 14 Bradw. 181.

In Louisiana, the holding over creates an estate from month to month, *Armstrong v. Bach*, 20 La. Ann. 190. In Connecticut, holding over is no evidence of an agreement for a further lease, Rev. Gen. Stats. (1875), T. 18, Ch. 6, § 16, p. 354.

The Effect of Holding Over on Privileges Conferred by the Lease, etc.

While a holding over, with the landlord's consent, will generally continue the privileges conferred by the lease, as to remove buildings, *Lawney's Trustees v. St. Louis*, 39 Mo. 177, yet it will not extend the time within which a tenant has covenanted to make certain improvements, *Pollman v. Morgester*, 99 Pa. St. 611; and, on the other hand, when the tenant has confessed a judgment, to cover the rent to accrue during the originally granted term, a holding over will not extend the scope of the judgment so that it will cover rent accruing thereafter, *Smith v. Pringle*, 14 Reporter 534.

Descent of Term of Leases.

A term of years, being a chattel real, goes to his executor or administrator as ordinary personal assets for the payment of debts, Co. Litt. 46 b; but the common law in this respect has been altered in Massachusetts, Georgia, Ohio, and Missouri. See *supra*, p. 40.

Tenancy at Sufferance.

RUSSELL v. FABYAN *et al.*

Supreme Judicial Court of New Hampshire, July Term, 1856.

[Reported in 34 New Hampshire 218.]

- A tenant under a written lease held over after its expiration ; it was *held*, that after his lease expired he was a tenant at sufferance.
- A tenant at sufferance, until the landlord enters upon him, is not liable to an action of trespass ; but he is still answerable for any damages growing out of his interference with the property, as a disseizor would be, who is responsible for any damages occasioned by his conduct, whether wilful or negligent.
- An action on the case is the proper remedy for any such injury ; and if the tenant has taken a lease and bond of indemnity from a third person, the latter is liable with him in such action.
- When the land of a debtor is set off on execution, he has a right of redemption, which may be taken and sold, subject to a like right of redemption, and so on successively.
- If the debtor has conveyed the property before any levy, by a deed, voidable by creditors, the grantee has still an interest entitling him to redeem any of these levies.
- An offer to prove the deed of the plaintiff to be fraudulent as to creditors, made by a purchaser on a second levy, commenced after the making of the deed, was proper, and the evidence should have been received.

THIS is an action on the case, brought July 2, 1853. In the declaration it was alleged in substance that the defendant Fabyan, having been a tenant of a certain hotel in Carroll for a term of five years, which expired on the 20th of March, 1852, the defendants wrongfully continued to occupy the same after the said lease expired ; and so negligently and carelessly conducted and managed certain fires by them set and kept in said hotel, that on the 29th of April, 1853, the same was burned down and consumed. The defendants pleaded severally the general issue—*not guilty*.

To show title to the house described in the declaration, the plaintiff showed that the land on which it stood, together with a part of the

house, were in possession of E. A. Crawford on December 12, 1837, and for many years before, and that on that day said Crawford conveyed the same to Nathaniel Abbot, who, on June 24, 1842, conveyed the same to Daniel Burnham. Said Burnham, on the 20th of August, 1844, deeded the same hotel and land to the plaintiff. The plaintiff, on January 28, 1847, executed a lease of said hotel to the defendant Fabyan, for the term of five years from March 20, 1847, who held the same under said lease until he accepted a lease from one Dyer, as hereinafter mentioned. On the 19th of March, 1852, an agent of the plaintiff, duly authorized, call upon said Fabyan, at Conway, where he resided, and on the 20th of March called upon said Fabyan's servant, who had charge of said hotel, at said hotel, and on the 22d of March again called on said Fabyan, at Conway, and on each occasion demanded that possession of said hotel should be surrendered to the plaintiff, which was refused—said Fabyan saying that he had taken a lease from said Dyer. And it appeared that on March 19, 1852, and from that time until after said hotel was burned, said Fabyan held possession of the same by lease from said Dyer, who had also agreed to indemnify him against any suit brought against him by said Russell for rents, and from all costs, trouble and expense of any kind which might happen to him on account of his taking said lease. On April 29, 1853, said hotel, then occupied as such, took fire from some one of the stoves or fire-places used therein for cooking, or for warming the building, or from sparks from the same, and was entirely consumed.

The defendants offered the following testimony, to the competency of which the plaintiff objected: viz., a copy of a judgment recovered by said Dyer against said Daniel Burnham, at the Court of Common Pleas for Carroll county, May term, 1848, and the execution issued thereon, with the return of satisfaction thereof, by a levy in due form of law upon said land and hotel, as the property of said Burnham. The suit was commenced May 10, 1843, and the hotel and lands attached May 16, 1843, and the set-off commenced in thirty days after judgment.

In reply to this evidence the plaintiff proved that on November 30, 1849, he tendered to said Dyer, for the redemption of said property from said levy, the sum of \$5394.50, being the amount for which the same was set off, with costs, expenses and interest, and left the same, without his consent, at said Dyer's house, the said Dyer refusing to

receive it. The defendants also offered in evidence a copy of another judgment, recovered by him against said Burnham, at the Court of Common Pleas for Carroll county, May term, 1848, for \$4791.56 damages, and \$20.58 costs; which judgment was recovered in a suit founded upon said Burnham's certain notes, bearing date October 10, 1835, and the return of the seizure and sale upon said execution to the said Dyer of the right of said Burnham to redeem the said hotel from the levy before mentioned. The defendants also offered evidence for the purpose of showing that the conveyance hereinbefore mentioned, from said Burnham to said plaintiff, was fraudulent and void as against creditors, because made without consideration, and for the purpose of preventing said property from being attached for his debts. The plaintiff objected to the competency of all the foregoing evidence offered by the defendants.

It was agreed that the case should be transferred to this court for the decision of the questions of law arising in the same; and that if this court should be of opinion that the evidence so offered by the defendants is admissible to show the said conveyance to be fraudulent, the case shall be transferred back to the Court of Common Pleas for trial. If, upon the other competent evidence before stated, either party is entitled to judgment, the same shall be rendered accordingly, the damages to be assessed by a jury, if the judgment is for the plaintiff.

H. A. Bellows, for the defendants.

On the facts stated in the declaration, case does not lie. The wrongful holding out and kindling fires is in substance and force a trespass, if anything, being both immediate and forcible. The plaintiff cannot waive the trespass and go for the consequential damages, for, the trespass being waived, there is nothing left as a ground of recovery; 2 Greenl. Ev., sec. 226; no negligence being charged in managing the fires, and it not appearing that the plaintiff is a reversioner.

It cannot be maintained on the ground that Fabyan was tenant, for there is no such allegation, but, on the contrary, a wrongful holding. 2 Saund. 252, n. a; *Strafford v. Eaton*, 13 Ohio 334. If the plaintiff does seek to hold them on this ground, he cannot hold Dyer, for there is no pretence that he was tenant of the plaintiff.

If, however, Fabyan could be regarded as holding over, he is tenant at sufferance, and the plaintiff cannot recover for holding him out, until he has entered and put an end to the tenancy; for, being in by lawful

right, the law will suppose that to continue. 1 Cru. Dig., tit. 9, chap. 20; and chap. 2, sec. 1, and notes; Taylor's Landlord and Tenant, sec. 64. It can be put an end to only by a notice in writing. Comp. Stat. 553, chap. 222, sec. 1, and in *Currier v. Perley*, 4 Foster 219; and further, as to maintaining the action, *King v. Goodwin*, 6 Mass. 1; *Rising v. Stanwood*, 17 Mass. 282; 4 Kent Com. 117; 2 Bla. Com. 150, and notes.

But supposing Fabyan to have been tenant of the plaintiff, as the plaintiff claims, and to have been properly declared against, still he could be held only on the ground of covenant to rebuild, and none is shown; 1 Bla. Com. 282; *Warner v. Hutchins*, 5 Barb. 666; and if there had been such covenant by Fabyan, Dyer could not have been joined in the suit, even if case in the nature of waste might have been maintained.

Taking the declaration as it stands, as undertaking a charge the defendants on the ground of being disseizors in case, we say it cannot be maintained against both; for Dyer has done no act whereby the building was burned; nor against Fabyan, who appears to be in under Dyer, who was claiming title in good faith, and the injury having been the result of accident and without fault. A tenant at sufferance is liable for wilful waste, but not for accident. 1 Ch. Pl. 140, 141, 142; 2 Ch. Pl. 785, n. g, 777; 1 T. R. 708; 1 Paige 355; Co. Litt. 27, a, 1; 3 Johns. 44; Com. Dig., Cond. L, 12; 1 Saund. 322, 323; 1 Greenl. Cru. Dig., tit. 3, chap. 1, sec. 76, and note 4; Kent Com. 82; Co. Litt. 57, and note 377; 3 Bla. Com. 229, n. 7. Nor tenant at will. Greenl. Cru. Dig. 1, 244; 3 Bla. Com. 229, note 4; Kent Com. 117. No case is found where an action is held to lie in such a case as this. Cases must often arise where accidental injuries have arisen while the property was in possession of one who claimed it in good faith, but was, nevertheless, adjudged not to have the title. Such cases must be frequent in equity.

An action will not lie by a mortgage against a third person for negligently injuring the mortgaged premises, by which he has lost his security; but otherwise if done with intent to injure the mortgagee. *Gardner v. Heartt*, 3 Denio 232, and cases; *Merrill v. Wilson*, 2 Harr. 443; 4 U. S. Dig. 41, 18.

Lyford, for the plaintiff, contended that the defendants having refused to surrender the premises at the termination of the plaintiff's lease

to Fabyan, became liable for all the consequences following that refusal.

2. That the defendant Dyer took nothing by his sale of the equity of redemption on any execution against Burnham. Burnham having by his deed, dated August 20, 1844, conveyed the premises in fee to the plaintiff, he had no equity of redemption at any time after that conveyance. *Russell v. Fabyan*, 7 Foster 529.

BELL, J.*—Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseizor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bla. Com. 150; 4 Kent Com. 116; *Livingston v. Tanner*, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor, or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. *Conway v. Starkweather*, 1 Denio 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseizor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at suf-

* PERLEY, C. J., having been of counsel, did not sit.

ferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseizor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong. *Delaney v. Ga Nun*, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire, it becomes material to inquire, what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he *retains* the possession as a wrong-doer, just as a disseizor *acquires and retains* his possession by wrong. *Den v. Adams*, 7 Hals. 99; 2 Bla. Com. 150; 4 Kent Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Ab. 416, Estate, D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit. *Jackson v. McLeod*, 12 Barb. 483; 12 Johns. 182; 1 Cru. Dig., tit. 9, sec. 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. *Livingston v. Tanner*, 12 Barb. 483; *Den v. Adams*, 7 Hals. 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as was held in *Preston v. Love*, Noy 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseizor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance, until he has entered upon the premises; 4 Kent Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseizor and unqualified wrong-doer.

By Stat. 6 Anne, chap. 31, made perpetual 10 Anne, chap. 14, (1708, 1712,) no action or process whatever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, n. 377; 3 Bla. Com. 228, n.; 1 Com. Dig. 209, Action for Negligence, A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseizor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseizor is liable for any damages occasioned by him, whether wilful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseizor.

II. Assuming that Fabyan is liable for the loss of these buildings, the question arises, whether he is liable in this form of action; and, as we have remarked, he is not liable in trespass. Chancellor Kent, (4 Com. 116,) says: "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. *But before entry he cannot maintain an action of trespass against the tenant by sufferance.*" 1 Cru. Dig., tit. 9, chap. 2; *Rising v. Stanard*, 17 Mass. 282; *Keay v. Goodwin*, 16 Mass. 1, 4; 2 Bla. Com. 150; Co. Litt. 57, b; *Livingston v. Tanner*, 12 Barb. 483; *Trevillian v. Andrew*, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of *trespass on the case*. There is no evidence of any entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of *West v. Trende*, Cro. Car. 187; S. C. Jones 124, 224, is a decision that case lies in such a case.

"Action upon the case. Whereas he was and yet is possessed of a lease for divers years *ad tunc et adhuc ventur*, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during that time pulled down the windows, etc. Stone moved in arrest of judgment that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass, as Littleton, sec. 71. If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

III. It seems clear that if Fabyan is to be regarded as a wrong-doer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan, so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the Court have not been furnished with a copy.

IV. The case of *Russell v. Fabyan*, 7 Foster^a 529, is not to be regarded as a decision of the question raised in this case, in relation to the sale of a supposed right of redemption as belonging to Burnham,

after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose, whether, if Russell's deed was proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defence. The defendant relied on an eviction on the 14th of June, 1848, as his defence. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defence. And the Court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to inquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest, within one year. Rev. Stat., chap. 195, sec. 13; chap. 196, sec. 5; (Comp. Stat. 501, 502.) This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested, (Rev. Stat., chap. 196, sec. 14,)

may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor, remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took precedence of Russell's deed; but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid, a right of redemption still remained to Russell, and he had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment, was *prima facie* a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 7 Foster. If the facts warrant that defence, the evidence is competent; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy

was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be

A new trial.

Tenancy at sufferance is defined by Blackstone to be "where one comes into possession of land by lawful title, but keeps it afterwards without any title at all," Blackst. Com., Lib. 2, p. 150. Coke's definition is more full: "A tenant by sufferance is he that at the first came in by lawful demise and after his estate ended continueth the possession and wrongfully holdeth over," Co. Litt., 57 b; and see *Coomler v. Hefner*, 86 Ind. 108. According to Mr. Tudor, *Leading Cases on Real Property*, note to Rouse's case, p. 9, this tenancy seems to have originated in the desire of the judges, when a particular estate had determined, without the knowledge of the person entitled in reversion, to prevent an adverse possession from arising, and, indeed, except in the particular that it is not adverse, and that entry must be made before the reversioner proceeds to recover the land, the possession of a tenant at sufferance differs little from that of a trespasser.

Circumstances under which Tenancy at Sufferance Arises.

This tenancy arises where a tenant *pur autre vie* holds over after the death of the *cestui que vie*, Co. Litt., 57 b; *Allen v. Hill*, Cro. Eliz. 238; or a tenant for life subject to a condition holds over after breach of the condition, Id.; or the widow of a tenant for life holds over after the death of her husband, *Bannon v. Brandon*, 34 Pa. St. 263; this at first seems questionable and to conflict with the definition of the tenancy at sufferance, since the widow never made entry in her husband's lifetime, and if she made any thereafter she could not have come in by lawful title, but an examination of the case will show that the Court was guided by the desire, of which Mr. Tudor speaks as the origin of the estate, to avoid an adverse possession, and so regarded the possession of the widow as a continuation of that of the husband, tenant for life; or where the tenant of a tenant for life holds over after the death of his landlord, *Page v. Wight*, 14 Allen 182; or where a tenant for years, without any agreement or disagreement on the part of his landlord to his continuance in possession, holds over after his

term has expired, *Russell v. Fabyan*, 34 N. H. 218; *Edwards v. Hale*, 9 Allen 462; *Jackson ex d. Van Cortlandt v. Parkhurst*, 5 Johns. 128; *Emerick v. Tavener*, 9 Gratt. 220; *Reed v. Reed*, 48 Me. 388; *Stearns v. Sampson*, 59 Id. 568; where the actual possession is retained by the wife of a tenant for years after the expiration of his term, her possession being his, he will be regarded as the tenant at sufferance, although at the time of making the lease there was an understanding that the wife should occupy the premises for a separate business of her own, *Knowles v. Hull*, 99 Mass. 562. A tenancy at sufferance arises where a tenant for years holds over after a sale of the reversion upon an execution issued upon a judgment which is prior in date to his lease, *Kellam v. Janson*, 17 Pa. St. 469; *Mozart Building Association v. Frisdjen*, 5 W. N. C. 318; where after the expiration of a lease, the tenant remains in possession at the suggestion of an agent of the owner, to whom no power to extend the lease has been given but who had executed the original lease, that he should continue to hold the premises until the owner could be heard from, *Jackson ex d. Van Cortlandt v. Parkhurst*, 5 Johns. 128; where the subtenant holds over after the determination of the tenant's lease, *Evans v. Reed*, 5 Gray 308; where one who has taken a conveyance of land for a greater estate than the grantor could legally give, retains possession after the expiration of the grantor's estate or power, as in *Griffin v. Sheffield*, 38 Miss. 359, where a purchaser in fee of a wife's land from the husband was held after the death of the husband to be tenant at sufferance to the wife; where one takes a lease from a person having a limited power of leasing and holds the land after the power has expired, as in *Antoni v. Belknap*, 102 Mass. 193, in which case an agent who was empowered to take charge of land until the return of the owner from beyond seas made leases for years and before, the expiration of the term limited, the owner returned, it was held that the lessees, continuing in possession after the owner's return, became tenants at sufferance. A tenancy at sufferance has also been held to arise where a tenant enters in pursuance of a lease for a definite time given by a person who does not own the fee, but who assumes without authority to act for the owner thereof, and the owner does not ratify the lease; and where one goes into possession under an order of an agent who was authorized to make leases subject to the ratification of the owner of the fee, and the owner never ratifies the lease, *Howard v. Carpenter*, 22 Md. 10.

Where a tenant at will holds over after the determination of the will he becomes tenant at sufferance, *Hollis v. Pool*, 3 Metc. 350, as where he holds over after the reversioner has aliened his estate, *Esty v. Baker*, 50 Me. 325; *Benedict v. Morse*, 10 Metc. 223; *Curtis v. Galvin*, 1 Allen 215; *Winter v. Stevens*, 9 Id. 526 (and the tenant will not be permitted to

inquire into the conveyance, *Curtis v. Galvin, supra*); or has executed a lease of the same premises to a third person, *Pratt v. Farrar*, 10 Allen 519; or has died, *Flood v. Flood*, 1 Allen 217.

A mortgagor who remains in possession of the mortgaged premises, there being no clause in the mortgage permitting such retention of possession, is a tenant at sufferance, *Lackey v. Holbrook*, 11 Metc. 548. A mortgagor in possession after foreclosure, *Allen v. Carpenter*, 15 Mich. 25; *Den v. Wade*, Spen. 291; after a sale under the mortgage, *Kinsley v. Ames*, 2 Metc. 29; or after condition broken, *Stedman v. Gassett*, 18 Vt. 346, is a tenant at sufferance. From the case of *Miner v. Stevens*, 1 Cush. 482, it would seem that in Massachusetts before a mortgagor retaining possession after a foreclosure can be regarded as a tenant at sufferance, he must have received notice to quit.

In *Cross v. Upson*, 17 Wisc. 618, A. held under a lease from B., which lease contained a clause making the assignment of the lease a cause of forfeiture; A. assigned to C., who entered on the premises. It was held that C. stood to B. in the position of a quasi-tenant at sufferance.

Where the vendor of land holds possession after the time at which he should have delivered possession to the vendee, he becomes a tenant at sufferance, *Hyatt v. Wood*, 4 Johns. 150; and see *Bennett v. Robinson*, 27 Mich. 26.

Tenancy at Sufferance Exists by Act of the Law.

As the estate at sufferance exists by act of the law, and not by creation of the parties, it follows generally that where there is any agreement between the tenant and landlord as to the occupancy this estate cannot exist, *Johnson v. Carter*, 16 Mass. 443; but in a very recent case, *Landis's Appeal*, 13 W. N. C. 226, the Supreme Court of Pennsylvania decided an occupation to have been a tenancy at sufferance where there was at least a tacit consent between parties. The facts of the case were these: a schism took place in a Mennonite congregation, and as a result the party which was ultimately held to represent the original congregation, and to be entitled to the church property, and the party which was ultimately held to be schismatic, occupied the church building on alternate Lord's days. This method of occupation went on for twenty-nine years. The Court held that the new or schismatic body was tenant at sufferance to the old or orthodox.

Entry of Tenant must have been Lawful.

It is necessary for the creation of this tenancy that the entry of the tenant should have been in the first place lawful; accordingly, one who

enters as the assignee of the tenant at will is not tenant at sufferance to the owner of the fee, but a disseizor, *Recknow v. Schanck*, 43 N. Y. 448; *Cunningham v. Holton*, 55 Me. 33; so also is one who enters as the heir of the tenant at sufferance, *Doe v. Perkins*, 3 M. & S. 271. The possession must also, to constitute a tenancy at sufferance, have come to the tenant by the act of the landlord, or of some one in privity with his title, thus the grantee of a judgment-debtor is not a tenant at sufferance to the purchaser of the land on an execution, *Cook v. Norton*, 48 Ill. 20; and if one come into possession merely by act of the law, and hold over after the determination of his particular estate, he is an abator, Co. Litt., 57 b; as if a guardian should hold over after the coming of age of his ward, Id.; *Livingston v. Tanner*, 14 N. Y. 64; or a husband seized in right of his wife should hold over after her death, Id., *supra*.

Tenancy at Sufferance Depends on Laches of Landlord. Cannot Exist as against Sovereign.

The tenancy at sufferance is said to depend on laches on the part of the reversioner, *Moore v. Morrow*, 28 Cal. 551; *Rowan v. Lytle*, 11 Wend. 616; and it also said that without such laches there cannot be a tenancy at sufferance; accordingly it is held in England that no one can be tenant at sufferance to the crown, for laches is not imputable to the sovereign, and a tenant holding over against the crown is an intruder, Co. Litt., 57 b; 2 Blackst. Com. 150; *Attorney-General v. Andrew*, Hard. 25; *Doe d. Watt v. Morris*, 2 Bing. N. C. 196; and it is presumed that the same doctrine would be held in this country with reference to the States. The importance of this qualification of the estate is in this, that if the person in possession of land is a disseizor or intruder he may be proceeded against without entry, but if a tenant by sufferance he must first be entered upon, *Russell v. Fabyan*, 34 N. H. 218; and the question of laches has become very important in certain States where acts have passed providing that the tenant by sufferance shall be entitled to notice to quit. See below, page 146.

No Privity between Landlord and Tenant at Sufferance.

In an estate by sufferance there is no privity between the landlord and tenant, Co. Litt., 270 b; *Bennett v. Robinson*, 27 Mich. 32; and hence a release to a tenant at sufferance is void, Co. Litt., 271 a.

Estoppel to Deny Landlord's Title Exists in Tenancy at Sufferance.

The relation, however, between the parties is such that the ordinary estoppel of the tenant to deny his landlord's title attaches, *Griffin v. Sheffield*, 38 Miss. 359.

Possession of Tenant at Sufferance is Tortious.

The possession of the tenant at sufferance, although not originating in tort, is tortious, *Den ex d. Decker v. Adams*, 7 Hals. 99; *Donell v. Johnson*, 17 Pick. 266; and he will be held to the liability of a trespasser for damages to the premises while his possession continues, *e. g.* for damages caused by a fire built by him upon the premises, and which accidentally spread and caused destruction, *Russell v. Fabyan*, 34 N. H. 218.

Tenant at Sufferance can Maintain Trespass against Wrongdoer, but if Turned Out Cannot Bring Ejectment.

The tenant at sufferance, while in possession, can maintain trespass against a mere wrongdoer, *Graham v. Peet*, 1 East. 244; but if turned out he cannot bring ejectment even against the wrongdoer, *Doe d. Crisp v. Barber*, 2 T. R. 749; as to his remedy against his landlord, see below, p. 144.

Not Entitled to Notice to Quit.

At common law the tenant at sufferance is not entitled to notice to quit, *Russell v. Fabyan*, 34 N. H. 218; *Jackson ex d. Anderson v. McLeod*, 12 Johns. 182; *Kinsley v. Ames*, 2 Metc. 29; *Benedict v. Morse*, 10 Id. 223; *Livingston v. Tanner*, 14 N. Y. 64; *Den v. Wade*, Spen. 291; *Emerick v. Tavenor*, 9 Gratt. 220; *Rich v. Keyser*, 54 Pa. St. 86; and see Comp. Laws Kansas (1879), § 3001, p. 521; or to demand of possession, *Howard v. Carpenter*, 22 Md. 10; but the landlord may at once enter on the premises, *cases supra*; and the fact that the tenant has attorned to or taken a lease from a stranger makes no difference in this right, *Russell v. Fabyan, supra*; but before bringing trespass or ejectment the landlord must make an entry so as to put an end to the estate by sufferance, *Rising v. Stannard*, 17 Mass. 282; *Keay v. Goodwin*, 16 Id. 1. Any entry will be sufficient for this purpose, according to SHAW, C. J., where "the party having the right enters on the land either declaring his purpose to be to regain possession or doing such acts of ownership expressive of his intent to hold as owner;" it is not necessary that he obtain a peaceable and exclusive possession, *Donell v. Johnson*, 17 Pick. 266. In California the effect of legislation on the subject is said to be to render a formal demand good in lieu of entry, *Uridias v. Morrell*, 25 Cal. 31.

Entry—How Made. Statutes of Forcible Entry and Detainer.

The question as to how entry may be made is one upon which the courts are not unanimous. There is a line of authorities which hold that although

upon general principles at common law a man has the right to repossess himself of his land, provided he can do so without a breach of the peace, yet in view of the statutes of forcible entry and detainer, which, based upon the Statutes 5 Rich. II., c. 8, and 8 Hen. VI., exist in nearly all of the States, the landlord will not be permitted to use force to effect his entry, and if he do so will be liable to the tenant in an action of trespass *quare clausum fregit*. The foremost exponent of this view is the Supreme Court of Vermont, which Court, in *Dustin v. Cowdry*, 23 Vt. 631, in which REDFIELD, J., delivered a very elaborate and learned opinion, departed from the position it had formerly held; see *Beecher v. Parmele*, 9 Vt. 352. This case was followed, after a review of the authorities on both sides of the question, by the Supreme Court of Illinois, in *Reeder v. Purdy*, 41 Ill. 279, in which case it was urged that although the tenant might have a remedy on the statute, yet, for lack of title, he could not maintain trespass *quare clausum fregit*; but LAWRENCE, J., in delivering the opinion of the Court, said: "The law is not so far beneath the dignity of a science and harmonious system that its tribunals must hold in one form of action a particular act to be so illegal that immediate restitution must be made at the costs of the transgressor, and in another form of action that the same act was perfectly legal and only the exercise of an acknowledged right." And the Court held that the statutes of forcible entry and detainer should be so construed as to take away the common law right of forcible entry. The distinction which the Court in this case scouted at has been approved by the Supreme Court of Missouri, in which State it is held that the landlord may be held liable in an action under the statute by the tenant; but that the latter cannot, on account of his defect of title, maintain trespass *quare clausum fregit* against the landlord. *Krevet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, 26 Id. 116. The distinction is certainly not an illogical one; for, while the statute may bestow on the tenant any remedy which the wisdom of the legislature may provide, for any harm done to him, yet the tenant has no title, his possession is tortious, and as the very ground upon which the action of trespass *quare clausum fregit* rests is the assumption that the plaintiff has title, at least as against the aggressor, it is impossible that the close of one who has no title should be broken by the owner of the fee.

The great weight of authority is to the effect that if the landlord, having the right of possession, make an entry and eject the tenant, using such force only as is necessary to effect his purpose, and which does not amount to a breach of the peace, and although his actions may be such as will subject him to indictment by the commonwealth, yet the tenant can neither bring trespass *quare clausum fregit*, nor recover damages for the entry. *Winter v. Stevens*, 9 Allen 526; *Sampson v. Henry*, 13 Pick. 36; *Moore v. Mason*,

1 Allen 406; *Todd v. Jackson*, 2 Dutch. 525; *Muldrow v. Jones*, Rice 64; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Ives v. Ives*, 13 Johns. 235; *Jackson ex d. Seelye v. Morse*, 16 Id. 197; *Jackson ex d. Stansbury v. Farmer*, 9 Wend. 201; *Hyatt v. Wood*, 4 Johns. 150; *Wood v. Phillips*, 43 N. Y. 158; *Johnson v. Hannahan*, 1 Strobh. 313; *Tribble v. Frame*, 7 J. J. Mar. 617; *Meador v. Stone*, 7 Metc. 147; *Stearns v. Sampson*, 59 Me. 568; [but see *Moore v. Boyd*, 24 Me. 242;] *Sterling v. Warden*, 51 N. H. 217; [it is to be noted, however, that in New Hampshire, at the time of this decision, the statute of forcible entry and detainer had been repealed;] *Overdeer v. Lewis*, 1 W. & S. 90; *Adams v. Adams*, 7 Phila. 160; *Commonwealth v. Kensey*, 2 Pars. 401; S. C. 3 Clark (Pa.) 233; *Kellam v. Janson*, 17 Pa. St. 469; but the landlord cannot, by his right of entry, justify an assault and battery or undue violence to the person of the tenant or his servants and will be liable therefor in trespass, *Sampson v. Henry*, 13 Pick. 36; *Adams v. Adams*, 7 Phila. 160; *Wilder v. House*, 48 Ill. 280.

In *Mason v. Holt*, 1 Allen 45, where one placed a house on the highway by the permission of the owner of the adjoining land, the said owner limiting the time during which his assent to the occupation of the highway should be of effect to six months, and after that time the houseowner was notified to remove the building, and did not do so, whereupon the landowner dug about the house so as to endanger its safety, it was held that the houseowner, being a mere tenant at sufferance, could not, for lack of title, maintain an action against the landowner.

Tenant held in Some Cases Entitled to Reasonable Time within which to Remove.

While, as we have seen, the rule of law is that a tenant by sufferance is not entitled to notice to quit, yet in some cases it has been held that he is entitled to a reasonable time within which to leave the premises. See *Moore v. Boyd*, 24 Me. 242; *Antoni v. Belknap*, 102 Mass. 193; *Pratt v. Farrar*, 10 Allen 519. The privilege would seem to exist where the tenant entered with reason to expect a longer continuance of his term than actually took place, and it was brought to an end not by the expiration of a definite time or by the occurrence of an agreed upon event, but by the occurrence of something over which the tenant had no control, and for which, at the time it took place, he could not reasonably be expected to be prepared. Thus in *Antoni v. Belknap* the term of years was abruptly brought to an end by the return of the owner of the land from abroad, and *Pratt v. Farrar* was a case of a determination of an estate at will. The cases of this character are, perhaps, not sufficiently numerous to justify the con-

clusion that there is a recognized exception to the rule that the tenant at sufferance is not entitled to notice, but they still seem to be supported by considerations of equity and fairness.

What is reasonable time differs according to circumstances; in *Pratt v. Farrar* a period of about forty-eight hours was considered sufficient.

Statutes Giving Tenant at Sufferance Right to Notice to Quit.

In some States the tenant by sufferance has been given by statute a right to notice to quit. Thus in Kentucky, Gen. Stat. (1881 Bull. & Fel.), Ch. 66, Art. VI., § 1, p. 609; Missouri, Rev. Stat. (1879), § 3078, p. 515; New York, 3 Rev. Stat. (1882), Pt. 2, Ch. 1, Tit. IV., § 7, p. 2201, he must be given a month's notice; in Wisconsin, a month, unless there is a rent reserved for the premises, payable at intervals of less than one month, in which case notice for a time equal to one of the intervals is sufficient, Rev. Stat. (1878), § 2183, p. 629; in Michigan, three months, unless the rent is payable at intervals of less than three months, in which case notice of a length of time equal to one of the intervals is sufficient, Howell's Ann'd Stat. (1882), § 5774, p. 1500; in Oregon, the time fixed is three months; Miss. Laws (1874), Ch. 17, Tit. III., § 34, p. 588. In Rhode Island, Pub. Stat. (1882), Ch. 232, § 1, p. 648, and New Hampshire, Gen. Laws (1878), Ch. 250, § 1, p. 575, the provision is simply that the tenant shall be notified to quit on a day specified. In Massachusetts, by the Statute of 1825, C. 89, § 4, tenants at sufferance and at will were both entitled to notice to determine the tenancy, but in the Revised Statutes of 1836, C. 60, § 26, the provision for notice to the tenant by sufferance was omitted, as said by the revisers and by SHAW, C. J., by design. See *Kinsley v. Ames*, 2 Metc. 29.

Amount of Laches Necessary in States where Tenant at Sufferance is Entitled to Notice, to Create Tenancy at Sufferance.

In view of the privilege of notice thus extended by statute to the tenant by sufferance, it would seem only proper and just that the degree of laches on the part of the landlord required to convert one holding over into a tenant at sufferance, within the meaning of the statute and entitled to the privileges thereof, should be greater than would be required at common law to create a tenancy at sufferance with no rights beyond those vested in the tenant and recognized by the common law; and such seems to have been the opinion of the courts in the State of New York. A mere holding over will, therefore, not be sufficient; as said by EARL, Com.: "If within the meaning of our statute (1 R. S. 745, 746) every tenant holding

over his term for the briefest time is to be deemed a tenant at sufferance, and thus entitled to notice to quit, then every lease for one year will be, at the will of the tenant, practically extended to a lease for thirteen months, as no proceedings can be instituted for his removal until the expiration of the month's notice," *Smith v. Littlefield*, 51 N.Y. 539; and the Court in that case held that "to entitle the tenant who holds over a definite term to notice, the holding over must be continued for such a length of time after the expiration of the term and under such circumstances as to authorize the implication of assent of the landlord to such continuance." This, it is thought, is an excellent rule by which to determine when the tenant is entitled to notice; but, at the same time, where an *assent* of the landlord to the occupancy of the tenant can be properly implied, the very essence of a tenancy by sufferance is gone, and the Court would seem practically to hold that under the statute the tenancy at sufferance therein mentioned is a tenancy at sufferance which has been converted into one at will; but the case above cited does not, even in its form of expression, stand alone or unsupported; almost the very words are found in *Rowan v. Lytle*, 11 Wend. 616, where SAVAGE, C. J., said: "For the purpose of giving the statute a fair construction and beneficial operation no notice should be held necessary unless the landlord has permitted the tenant at sufferance to continue for such a length of time as to imply assent." In *Rowan v. Lytle* three months were not considered a sufficient time to give rise to the presumption of assent, when the landlord had not taken legal steps, but had endeavored to obtain possession of his property amicably. And see *Garner v. Hannah*, 6 Duer 262.

In *Livingston v. Tanner*, 14 N.Y. 64, the Court of Appeals, reversing the decision of the Supreme Court in 12 Barb. 481, held that under the 1 Revised Statutes 749, § 7, a tenant *pur autre vie* holding over after the death of *cestui que vie* was a trespasser, and not entitled to notice to quit as a tenant by sufferance.

Tenant at Sufferance Not Liable for Rent as Rent. Liability for Use and Occupation.

A tenant at sufferance is not liable at common law for rent as rent, *Delano v. Montague*, 4 Cush. 42; *Flood v. Flood*, 1 Allen 217; *Merrill v. Bullock*, 105 Mass. 486; and, as remarked by CHRISTIANCY, J., in *Hogsett v. Ellis*, 17 Mich. 351, the reason generally given, "that it was the landlord's own folly to suffer the tenant to continue in possession," applies as well to an action for use and occupation; nevertheless, in its regard to the tenant's liability to this latter action the authorities have differed. It is

held that there can be no action for use and occupation in *Boston v. Binney*, 11 Pick. 1; *Allen v. Thayer*, 17 Mass. 299; *Mayo v. Fletcher*, 14 Pick. 525; *Cobb v. Arnold*, 8 Met. 398; and in *Merrill v. Bullock*, 105 Mass. 486, in which, however, GRAY, J., who reviews the course of decision in Massachusetts, qualifies the position by stating that in Massachusetts there could be no action for use and occupation where the tenant at sufferance had never occupied under the plaintiff, or a party in privity with him, but claimed to hold adversely, and in *Emmes v. Feeley*, 132 Mass. 346, the Court held a tenant at sufferance under Gen. Sts., C. 90, § 25, liable for use and occupation. This case is, however, not in conflict with the law as stated by GRAY, J., as the tenancy at sufferance arose through a holding over by a tenant at will after a determination of the lessor's will.

On the other hand, the liability of the tenant at sufferance for use and occupation is upheld in *Bush v. National Oil Refining Co.*, 5 W. N. C. 143, S. C. 5 Reporter 443; *Mozart Building Association v. Frisden*, 5 W. N. C. 318; and see *Semmes v. U. S.*, 14 Ct. of Ch. 493; and in *Hogsett v. Ellis*, 17 Mich. 351, in which last cited case the Court, while admitting that the tenant at sufferance was not liable at common law for rent as rent, found the reason thereof in the fact that he might be violently dispossessed at any moment, and considered that in view of the statute giving the landlord a right to recover treble damages against a tenant holding over after notice to quit, the law must be held to be changed, as the right of the landlord to recover for the withholding of his premises was recognized, and that the bringing of an action for use and occupation was to be regarded as a waiver of the treble damages and an election to take the actual damages only.

It may be remarked that in those States in which acts have been passed subjecting a tenant holding over to the payment of damages fixed by the statute, see page 123, it is a matter of comparatively little moment to the landlord whether he can maintain an action for use and occupation or not,

Permanent Improvements Made by Tenant at Sufferance.

A tenant at sufferance who erects permanent improvements on the land has no right to recover their value from the landlord; it was his own folly to have erected them; but in *Dean v. Feeley*, 69 Ga. 804, it was held that where permanent improvements were made in good faith by a tenant at sufferance, he might be allowed their value to the extent of the amount found to be due by him for the use of the land, but he would be entitled to no further allowance therefor.

Tenancy at Sufferance may be Changed by Act of Landlord into Tenancy at Will or from Year to Year.

While no act of the tenant at sufferance alone can change the character of his tenancy or convert it into anything else, *Russell v. Fabyan*, 34 N. H. 218; *Den ex d. Decker v. Adams*, 7 Hals. 99; yet it may be changed to an estate at will or from year to year by any act of the landlord which manifests an assent to the tenant's occupancy, as by the receipt of rent from the tenant, *Russell v. Fabyan*, *Den v. Adams*, *supra*; *Emmons v. Scudder*, 115 Mass. 367; *Cunningham v. Holton*, 55 Me. 33; but mere delay by the landlord for a reasonable time in taking possession of the land will not change the character of the estate, *Den v. Adams*, *supra*; *Edwards v. Hale*, 9 Allen 462; although a long-continued delay may have that effect.

When an act has taken place which changes the character of the estate both parties are bound thereby, and the tenant can no more claim that he is a tenant at sufferance, with the right to leave at his pleasure, than this landlord can claim the right to summarily dispossess him, *Emmons v. Scudder*, 115 Mass. 367.

Tenancy at Will.

JOHN CHEEVER *et al.* v. GEORGE PEARSON *et al.*

Supreme Judicial Court of Massachusetts, November Term, 1834.

[Reported in 16 Pickering 266.]

Where a parish, in which there was no settled minister, leased the parsonage land for 999 years, it was *held*, that the lease vested in the lessees such rights of entry and possession as the parish had, whatever might be the effect of the lease as against a successor in the ministry.

A parish voted, that "B. and others have liberty to erect a seminary house on the parsonage land within what is hereafter described the seminary yard, with liberty to remove the same at pleasure, and that they have the land from the road, etc., for a seminary yard." It was *held*, that the vote created a tenancy at will; but that if it was equivalent to a license, such license was revocable so far as it remained executory and looked to future acts.

TRESPASS *quare clausum*. The writ was dated February 11, 1833.

The parties stated a case.

On March 14, 1821, a subscription paper was signed by Ezra Brown, Benjamin Hitchings, one of the defendants, and others, setting forth that the subscribers thereto agreed "to build a seminary house on the parsonage land," having obtained liberty from the parish for the purpose, agreed to divide the property in the building into shares of five dollars each, and to pay respectively the sums of money set against their respective names.

A meeting of the first Congregational Society in Saugus, (which was the parish referred to in the agreement,) was held on May 12, 1821, in pursuance of a warrant, which stated that the meeting was called "for the purpose of acting on the following article, agreeable to a petition of Benjamin Hitchings and others." At this meeting, the following vote, which was in substance copied from the article in the warrant above referred to, was passed: "Voted that Ezra Brown and others have liberty to erect a seminary house on the parsonage land within what is hereafter described the seminary yard, with liberty to remove the same at pleasure, and that they have the land from the road over

the knoll back to the wall, and from the west end of the house to the barn inclusive for a seminary yard, with the exception of a carriage passage-way from the house to the road and to the barn, to be common to the occupier of the house and seminary building, and that each have a passage-way and the use of the pump."

The building was erected in 1821, on the parsonage land, by the subscribers to the agreement, who formed themselves into an association and continued from year to year to choose a clerk, directors, etc., for the purpose of taking care of the building. The defendants were directors at the time of the alleged trespass. The building was one story high, about thirty-four feet long and twenty-six feet wide, on stone underpinning, with a cellar of eight feet depth under about half of the building, and stairs leading into the cellar; and there was a brick furnace in the cellar, to warm the whole building through tubes.

On March 4, 1830, a resolve was passed by the legislature, on the petition of the parish praying for leave to sell their ministerial lands, by which the parish were authorized "by a committee to be duly chosen by them for that purpose, to make sale of the real estate in said Saugus belonging to said society, or such part thereof as they may think proper."

Previously to October 3, 1832, a committee of the parish gave a verbal notice to the proprietors of the building to remove from the land of the parish, in one week, whatever belonged to the proprietors; and on November 5, 1832, the committee gave the proprietors a notice in writing to the same effect.

On January 14, 1833, the parish, by a committee chosen for the purpose, leased the land on which the seminary stood, to the plaintiffs, their heirs, etc., during the term of 999 years.

On January 29, 1833, the plaintiffs, after a demand on the directors to deliver to them the key of the building and a refusal by the directors, forced off the lock and affixed a lock provided by themselves. On February 1, 1833, the defendants entered the close, removed this lock, and placed another upon the door; which was the trespass complained of.

There was no settled minister of the parish in 1821, 1832, or 1833. Ezra Brown died in February, 1829.

If the Court should be of opinion, that the action could be maintained, the defendants were to be defaulted; otherwise the plaintiffs were to be nonsuited.

Choate, for the plaintiffs, to the point, that the vote of the parish operated as a lease to Ezra Brown, either for life or at will, or as a license, executed indeed so far as respected the building, but executory as to everything else, and therefore revocable, cited *Regina v. Winter*, 2 Salk. 587; Com. Dig. Estates by Grant, H 1; *Roe v. Lees*, 2 W. Bl. 1173; *Cook v. Stearns*, 11 Mass. R. 533; *Fentiman v. Smith*, 4 East 108; *Wells v. Banister*, 4 Mass. R. 514; *Washburn v. Sproat*, 16 Mass. R. 449; *Doty v. Gorham*, 5 Pick. 487; *Right v. Proctor*, 4 Burr. 2208; that whether the interest of Brown was that of a tenant for life, or at will, or at sufferance, or whether the vote was a mere license, such interest terminated at his death, or at least after notice, *Rising v. Stannard*, 17 Mass. R. 284; *Ellis v. Paige*, 1 Pick. 43; Cruise's Dig. tit. 9, c. 2, § 1; *Web v. Paternoster*, Palm. 71; St. 1825, c. 89, § 4; that Brown had an estate, under the vote, expressly at his will, and consequently that it was at the will of the other party, Co. Litt. 55 a; Cruise's Dig. tit. 9, c. 1, § 9; 10 Viner's Abr. 396, Estate, (S. b.); and that as there was no settled minister in the parish at the time, the lease of the land by the parish to the plaintiffs was valid, subject however to the right of a future minister, *Weston v. Hunt*, 2 Mass. R. 500; *Brunswick v. Dunning*, 7 Mass. R. 445.

Saltonstall, B. Merrill, and Lord, for the defendants, to the point, that the vote was equivalent to a license, and that as the license was executed, it was not revocable, cited *Webbe v. Paternoster*, 2 Rol. R. 152; Viner's Abr. License, E; *Winter v. Brockwell*, 8 East 308; *Taylor v. Waters*, 7 Taunt. 374; *Francis v. Boston and Roxbury Mill Corporation*, 4 Pick. 365; *Ricker v. Kelly*, 1 Greenl. 117; *Liggins v. Inge*, 7 Bingh. 682; to the point, that a corporation may be bound by its acts, without vote or deed, *Canal Bridge v. Gordon*, 1 Pick. 297; as to the right of the defendants to go to the building, *Harrison v. Parker*, 6 East 154; and to the point, that the lease was void, because it was not made in pursuance of the authority granted to the parish by the legislature, *Roe v. Prideaux*, 10 East 158; Shep. Touchst. 269.

SHAW, C. J., drew up the opinion of the Court. When this case first came before the Court, it was complicated with a number of facts and questions respecting the rights of the parish, and the powers of their respective committees and agents, which, upon consideration, do not

appear to affect the real question. The action is trespass *quare clausum fregit*, and both parties substantially rely upon their respective titles and the right of possession derived from them. The plaintiffs claim as lessees of the parish, and it was contended in behalf of the defendants, that as the lands were parsonage lands and the fee not in the parish, but in the minister, the parish had no right to make a long lease of the lands for 999 years; and as they had not followed the authority conferred upon them by the act of the legislature, which was, to sell and not to lease the estate, the lease was not rendered valid by that legislative act. But the only question now is, whether, at the time of the lease, and from that time to the commencement of this action, the parish had the right of possession, because, if so, their lease conferred a right of possession on the plaintiffs, whatever else might be the legal effect of it, and that right of possession was sufficient to enable them to give the notices and make the entries relied on as the basis of this action.

It appears by the facts agreed, that if the lands were, as contended by the defendants, strictly ministerial or parsonage lands, of which the fee is in the minister for the time being, still when there is no settled minister, the fee is in abeyance, and the custody and right of possession is in the parish. *Weston v. Hunt*, 2 Mass. R. 500; *Brunswick v. Dunning*, 7 Mass. R. 445. It is found in the present case, that there was no settled minister in the parish at the time, and the parish has continued vacant to the present time. Whether the lease will be valid or not, against a successor in the ministry, should one ever be settled in the parish, is now immaterial; the parish having the right to the rents and profits and to the custody and possession of the estate in the mean time, their lease was not void, but without the aid of the authority of the legislative act, was sufficient to vest in their lessees such right of entry and possession as they themselves had. The question therefore is upon the title relied on by the defendants.

The defendants rely upon the grant, license or permission given to Ezra Brown and his associates, by a vote of the parish passed May 12, 1821, for the purpose of erecting a building on the premises, for a school or seminary; and the defendants claim as owners of the seminary building. This vote, passed in pursuance of a sufficient article in the warrant for that purpose, was to this effect: that Ezra Brown and others have liberty to erect a seminary house on the parsonage land (describing it), with liberty to remove the same at pleasure.

Several of the questions raised in the case, it appears to us, it is not necessary to decide, as whether this vote vested any interest, or conferred any authority upon any person other than Ezra Brown, whether general evidence *aliunde* was admissible to show who were intended by the word "others," and whether the mention of the name of Hitchings in the article in the warrant, taken in connection with the vote, so referred to the written subscription paper, signed by Hitchings, Ezra Brown, and many others, as to make that paper evidence of the persons intended by the vote. For we are of opinion, that this cause may be decided upon other and different grounds. Giving the full force and effect to the vote of the parish, in the same manner as if the names of all the builders and proprietors of the seminary had been named in the vote, and admitting for the purposes of this inquiry, that the vote of an aggregate corporation, constitutes a memorandum or agreement in writing within the provisions of the statute of frauds, we must still examine and construe this vote to ascertain and declare its legal effect. Taking the whole vote together, as we must do, when we are construing it as the only evidence of the contract of the parties, in order to understand what was their intent, it appears to us very manifest, that it was not the intention or understanding of either of the parties, to grant away the parsonage land itself, but only the use of it to the extent and for the purposes indicated by the vote. The leading purpose of the vote is expressed in the first clause, which gives Brown and others liberty to erect a seminary house on the parsonage land, within what is thereafter described as the seminary yard, with liberty to remove the same at pleasure, and that they have the land from the road, etc., with certain reservations of rights of way, *for a seminary yard*. It was a right to erect the building and to use it as a seminary, with the appurtenances. But the right to enter upon, use, and possess the land of one at the pleasure of another, is a lease at will. It is no objection to considering it as a lease, that no rent is reserved; it was *quasi* public land, and the public benefit to be derived from the establishment of the school, was the real, and was probably deemed an adequate consideration. But there would be the same objection in considering it as a grant of any other character, there being no consideration expressed, and none implied, except the public benefit in the promotion of education.

It is, in general, true, that all interests in the use and enjoyment of lands for uncertain and indefinite terms, are in construction of law leases

at will. But if one grant the rents and profits of his land to another, he is tenant at will. Cart. 60. So, if one give license to another to come upon his dock and carry on his trade, because it is all the proper profits of a dock. *Regina v. Winter*, 2 Salk. 587. So, a person in possession of land, under a contract with the owner for a purchase not yet completed, is tenant at will. *Proprietors of No. Six v. M'Farland*, 12 Mass. R. 325; Com. Dig. Estates by Grant, H 1.

But in this case, this principle does not rest upon the general rule merely, though it is clearly within it, but also on the terms of the vote. The license is given for the erection of a seminary building, by others than the owners, the use of the land and the yard appurtenant is granted for that purpose, and liberty is given to the proprietors, to remove the building at their pleasure. It cannot be doubted, that whenever the building should be removed by the proprietors, according to the right reserved, all their right under this vote to the use of the land would cease. The consideration for the gratuitous use of the land, namely, the public benefit to the parish, for the maintainance of a school there, would also wholly cease. The same consequence would result by a fair legal implication, from the whole of the vote, though perhaps not so plainly provided for in the terms of it, in case the use and purpose, for which the building was erected, were changed; as if the proprietors had converted it into a manufactory.

If the use of the land was granted only until the building should be removed by the proprietors, and they were at liberty to remove it at their pleasure, it follows clearly, that it was a lease determinable at the will and pleasure of the lessees.

This being so, the rule is settled, and has been unquestioned from Lord Coke's time to the present, that every lease at will must, in law, be at the will of both parties. Therefore when a lease is made to hold at the will of the lessee, it must also be at the will of the lessor. Co. Litt. 55 a.

Applying these well established rules to this transaction, we are of opinion, that the legal character of the interest of the proprietors and builders of the seminary, was that of a tenancy at will, and of course, that it was competent for either party to terminate it in the mode prescribed by law. Whatever doubt there may have been, before the statute, as to the mode of determining the will, in case of a tenancy at will, having regard to the nature of the estate or other considerations, it is

now clearly provided, that it may be terminated by either party in all cases, after giving to the other party, three months' notice. St. 1825, c. 89, § 4.

It appears by the facts stated, that a verbal notice was given by the officers of the parish to the proprietors of the seminary, on October 3, 1832; that a formal written notice was given by the parish committee on November 5, 1832; that the lessees of the parish, the plaintiffs, entered on the 29th of January, 1833, more than three months after notice to quit, and that this action was commenced on the 11th of February following. The tenancy at will therefore had terminated, and the plaintiffs had the possession and right of possession, when this action was brought.

We think it would not present the case more favorably for the defendants, to consider the transaction in the other point of view, that of a license. As a license for many purposes may be given by parol, and as the statute is express, that no interest in lands shall pass by parol, it follows, that the enjoyment or benefit to be obtained by a license, is not strictly an interest in the land. A license, which is an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land, is, in its nature, countermandable. Still the distinction between a license executed and a license executory, is obvious and well founded in law. To say that an executed license cannot be revoked, is saying only, in other words, that an act lawful when it was done, in virtue of the license and permission of the owner of the land, cannot be rendered unlawful by a subsequent revocation of such authority. And the license which legalizes the act itself, renders lawful also its incidents and necessary consequences. But were it extended further, it would be a right to use the land of another without his consent, which is an interest in the lands. These doctrines are clearly established and well illustrated in a recent case, in which the authorities are fully considered. *Cook v. Stearns*, 11 Mass. R. 533.

To apply the doctrines of that case to the present. Supposing the vote of 1824 to be a good license to the proprietors and builders of the seminary, so far as they acted upon it before it was withdrawn and revoked, it was valid, and their acts under it were lawful. No action could be brought against them for entering the close, digging the cellar, erecting the building, and entering it from time to time to use and enjoy it, until the license was countermanded. But so far as it remained

executory, as it looked to acts still future, the license was revocable, and the acts and votes above cited as showing the determination of the interest, regarded as an estate at will, are sufficient to revoke the license, so far as it was executory; and the defendants therefore can find no justification for the entry made, and the act done by them, under such license.

Defendants defaulted.

Bracton mentions an estate or holding of land as follows: "Item dare potest quis alicui terram ad voluntatem suam et quamdiu ei placuit de termino in terminum et de anno in annum et in quo casu, ille qui accipit nullum habet liberum tenementum, cum dominus proprietatis rem sic concessam repetere possit sicut a precario." De Leg. et Cons. Angliae, fol. 27. This holding, called by Reeves, Vol. III., p. 526, "the precarious possession described by Bracton," had by Littleton's time developed into and become known as tenancy at will, and the tenant at will is thus by him defined: "Tenant at will is where lands and tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will because he hath no certain nor sure estate; for the lessor may put him out at what time it pleaseth him," Litt., Sect. 68. Blackstone's definition of an estate at will is: "An estate at will is where lands and tenements are let by one man to another to hold at the will of the lessor, and the tenant by force of this lease obtains possession," Bl. Com., Lib. 2, p. 145. To the above definitions it must be added that this species of tenancy or estate is at the will of both parties, at the will of the lessee as well as at that of the lessor, Co. Litt. 56 a; *Cheever v. Pearson*, 16 Pick. 266; *Doe ex d. Pidgeon v. Richards*, 4 Ind. 374; *Knight v. Indiana Coal Co.*, 47 Id. 105; *Davis v. Brocklebank*, 9 N. H. 73; *Moore v. Boyd*, 24 Me. 243; *Withers v. Larrabee*, 48 Id. 570; and hence, although the lease is expressly to hold at the will of the lessor, yet the law will imply that it is at the will of the lessee also, Co. Litt. 55 a, *Doe ex d. Pidgeon v. Richards*, *supra*; or if the lease is expressly to hold at the will of the lessee the law will imply that it is at the will of the lessor also, Co. Litt. 55 a; and so when the terms of the lease show that it is the intent of the parties that the estate granted shall be strictly at the will of one, and that the other shall have no voice in determining it within the term certain which is granted, the estate will not be held to be an estate at will. Thus in *Shaw v. Hoffman*, 25 Mich. 162, a lease for five years, containing a clause by which the tenant

agreed to surrender possession of the demised premises within that time, should the landlord conclude to build upon them, was held to confer not an estate at will, but an estate for five years, upon condition; and in *Cole v. The Lake Company*, 54 N. H. 242, the habendum of a lease was "to have and to hold said demised premises to said lessees for and during their pleasure," and a clause of the lease further provided that "all covenants and agreements herein contained shall extend to and bind their [the parties'] legal representatives." The subject of the grant was a right to draw water, and the lease was held to be a grant of a perpetual privilege. In delivering the opinion of the Court, LADD, J., remarked: "It is not contended but that a lessor may, by express contract, grant an estate, the duration of which shall depend upon the pleasure of the grantee, and when that is done there can be no pretence that the estate, so called, is a tenancy at will in the ordinary legal significance of the term."

This mutuality of will being taken into consideration, the definition of APPLETON, C. J., in *Cunningham v. Holton*, 55 Me. 33, seems a particularly good and comprehensive one: "A tenancy at will is an estate which simply confers a right to the possession of the premises for such indefinite period as both parties shall determine such possession shall continue."

Creation of Estate at Will.

The simplest manner of creation of an estate at will is where one lets land to another to hold at his will, *Harris v. Frink*, 49 N. Y. 24, or at the will of both parties; and the reservation of rent, payable at certain stated intervals, will not destroy the character of the estate as at will, *Woodrow v. Michael*, 13 Mich. 187; *Sprague v. Quinn*, 108 Mass. 553; *Say v. Stoddard*, 27 Oh. St. 478. And see *Waring v. Louisville and Nashville Railway Co.*, 19 Fed. Rep. 863. And, on the other hand, it is not necessary that rent should be reserved to constitute the tenancy, *Harris v. Frink*, *supra*; *Larned v. Hudson*, 60 N. Y. 102; *Doe ex d. Carson v. Baker*, 4 Dev. 220.

Condition, or Conditional or Contingent Limitation, may be Connected with Estates at Will.

A condition, or a conditional or contingent limitation, may be well connected with an estate at will, and the breach of the condition, duly taken advantage of by the reversioner, or the occurrence of the contingency will determine the estate, *Ashley v. Warner*, 11 Gray 43; *Clark v. Rhoads*, 79 Ind. 342; *Creech v. Crockett*, 5 Cush. 133.

No Formal Demise Necessary to Create Estate at Will. Cases in which Tenancy at Will is Implied.

It is not necessary that any formal demise at will be made, for, except in some States, which will be noted a little further on, an estate at will may arise by implication from the circumstances under which entry is made upon land, or the possession thereof is retained, or from the phraseology of the grant to the lessee.

An estate at will will arise where one enters by permission of another to remain for an indefinite time, *Larned v. Hudson*, 60 N. Y. 102; *Jones v. Shay*, 50 Cal. 508; *Goodenow v. Allen*, 68 Me. 308; or where he enters as a mere occupier, *Jackson ex d. Van Denberg v. Bradt*, 2 Caines 169; *Burns v. Bryant*, 31 N. Y. 453; *Post v. Post*, 14 Barb. 253; *Sarsfield v. Healy*, 50 Id. 248; *Herrell v. Sizeland*, 81 Ill. 457; *Johnson v. Johnson*, 13 R. I. 467; or with permission to enjoy the premises for an indefinite time free of rent, *Morgan v. The United States*, 14 Ct. of Cl. 319.

In *Sallabah v. Marsh*, 34 La. Ann. 1053, a grant in the following words, "I do hereby grant to Michel Sallabah and his wife, Lucy Sallabah, the privilege of living to the end of their days, free of rent, on a certain piece of ground known as the Point Field, containing about seventeen arpents. The said Michel Sallabah is to enclose the same at his expense. The said tract is to return to me or to my heirs at the death of the said Michel Sallabah and his wife," was held to create a tenancy at will, BERMUDEZ, C. J., saying: "The act relied upon to establish title is neither a sale nor a donation. It is not even a lease. It is simply a permission to occupy gratuitously, which constitutes the plaintiffs 'tenants at will.' The clause touching the fencing of the land was not inserted as a consideration, but as a release from an obligation in favor of the grantor." In connection with this case it must be borne in mind that in Louisiana a fixed rent is an essential part of a valid lease; see *ante*, p. 41.

Where one makes a lease of his land for an indefinite time it is *prima facie* at will, *Rich v. Bolton*, 46 Vt. 84. Where one makes a grant of the rents and profits of premises for an indefinite time an estate at will is given, *Cheever v. Pearson*, 16 Pick. 266; so where there is a grant of the right to erect buildings on the grantor's land and to occupy them, *Dame v. Dame*, 38 N. H. 429; *Cheever v. Pearson*, *supra*; or of the right to enter upon premises and there carry on a trade, *Cheever v. Pearson*, *supra*; so where one cut hay upon another's land and placed it in the barn thereon, under an agreement that he should divide the hay and take one-half thereof for his services, he was held a tenant at will, *White v. Elwell*, 48 Me. 360. A lease

until the land should be sold by the grantor, or be recovered by an adverse claimant, is a lease at will, *Lea v. Hernandez*, 10 Tex. 137.

Question of Tenancy as Affected by Relation of the Parties.

In *M'Gee v. Gibson*, 1 B. Mon. 105, there was a contract that the plaintiff should labor on the farm of the defendant for certain wages, and that the defendant should furnish him with a house at a monthly rent of two dollars; it was held that the plaintiff was tenant at will to the defendant; but in *Doyle v. Gibbs*, 6 Lans. 180, there was a contract between the plaintiff and the defendant by which the former entered the service of the latter, and was to receive the use of a house and twenty dollars a month so long as they could agree; it was held that no estate arose from the contract, that it constituted a mere hiring, and conferred none of the rights of a tenant at will upon the plaintiff; and see *People v. Kerrains*, 1 Thomp. & Cook (N. Y. Sup'r Ct.) 333. The Kentucky and New York cases seem irreconcilable, unless a sufficient reason for the difference of the decisions can be found in the fact that in *M'Gee v. Gibson*, a rent was fixed at which the plaintiff was to occupy the house to be furnished by his employer, while in *Doyle v. Gibbs* the use of the house and the stated monthly sum were put together as what was to be given on the part of the employer in return for the plaintiff's services. This distinction may be of value in endeavoring to arrive at the intention of the parties, but would not, it seems, be sufficient by itself to determine the question of the similarity or diverseness of the contracts in the two cases, since there is nothing in law or in the nature of things which would prevent services from standing in the position of rent.

The peculiar relation which in this country exists, or at any rate before the promulgation of the Papal Instructio of 1875 did exist, between a priest of the Roman Church and his bishop, has caused the nature of the possession by a priest of a parsonage house attached to the church served by him to become a matter for judicial consideration. The question arose in *Chatard v. O'Donovan*, 80 Ind. 20, in which case the Bishop of Vincennes had removed a parish priest from his position, and the priest retained possession of the parsonage. After giving the priest a month's notice to leave, the bishop proceeded to recover possession. The Court held that even if the priest could be considered as a tenant at will, the notice was sufficient, but held further that the relation between bishop and priest was not that of landlord and tenant, but one rather akin to that of master and servant. Woods, J., in delivering the opinion of the Court, said: "While it may not be said upon the facts of the complaint that the defendant was the hired servant of the bishop, it does appear that he was appointed to his position by and

held it at the discretion of the bishop, and that the possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office, and when in the exercise of that discretion, which, by the rules and customs of the church he had the right to employ, the bishop removed the defendant from the charge or pastorate over the congregation his right to possession of the property at once necessarily ceased. . . . We are, however, of the opinion that the relation of the parties was more like that of master and servant, the possession of the priest being in fact the possession of his superior, the bishop, who had power at any time, upon his own judgment or discretion, to remove one and install another in the office and in the possession of the property of the office." From the report of this case the fact of the publication of the instructio does not seem to have been brought before the Court, the case arising on a demurrer to a complaint which stated the rule of the Roman church as to the episcopal power as it was before the publication of the instructio; and what effect that document, which worked a certain change in the relations of priests and bishops, would have upon the question before us has not yet been decided.

In *Howard v. Merriam*, 5 Cush. 563, the defendant made a conveyance to one G., who by a written contract undertook to reconvey upon certain terms to the defendant, who in the meantime continued in possession under a parol agreement; he was held a tenant at will. In *Leavitt v. Leavitt*, 47 N. H. 329, A. made a deed to his son, in trust after A.'s death for the use of his widow, and on her death to vest in the son for his own use. After A.'s death the mother and son verbally agreed to live together and to constitute one family, the son to carry on the farm; the son was held to be, during the mother's life, a tenant at will.

Estate at Will Arising from Holding Over.

An estate at will arises where a tenant for years holds over after the determination of his lease and the landlord assents to such holding over, *Meno v. Haefel*, 46 Wisc. 282; *Gunsolus v. Lormer* (Supreme Court of Wisconsin), 12 N. W. Rep. 62; *Bennock v. Whipple*, 12 Me. 346; but there must be evidence of the landlord's assent to prevent the tenant from standing in the position of a trespasser, or, at best, that of a tenant by sufferance. Payment of rent, even under threat of ejection, will be sufficient evidence of assent, *Emmons v. Scudder*, 115 Mass. 367. Where a lease for five years had expired and the plaintiff, the landlord, told the defendant that he would not interfere with his possession until the plaintiff and his co-

tenant should make up their minds what to do with the land, and afterwards bills for rent were rendered and paid "as per lease," it was held that the defendant was a tenant at will, *Waring v. Louisville and Nashville Railway Co.*, 19 Fed. Rep. 863. It has been very generally held that the election between treating the tenant who holds over as a tenant at will or as a trespasser rests entirely with the landlord, see cases cited on p. 124; but, on the other hand, it has been held that in order that an estate at will shall exist when the tenant holds over "there must be a new contract, either express or inferrible from the dealings of the parties," *Edwards v. Hale*, 9 Allen 462; and it is also held that where a lease contains covenants for rent in the case of a holding over, such covenants will not of themselves confer the right to hold over, or create an estate at will, *Id.* For a fuller discussion of this subject, see page 126.

Where a tenant continues in possession under an agreement for a new lease he is tenant at will until the lease is executed, *Emmons v. Scudder*, 115 Mass. 367; *City of Dubuque v. Miller*, 11 Iowa 583.

Where a person in possession of lands holds over after a sheriff's sale, he is quasi-tenant at will to the purchaser, *Jackson ex d. Kane v. Sternbergh*, 1 Johns. Cas. 153; and the same position is said to be occupied by a mortgagor in possession, *Jackson ex d. Whitbeck v. Deyo*, 3 Johns. 422.

Entry under Agreement to Execute Lease.

Where one enters under an agreement to execute a lease, and then fails to do so, he is held to be a tenant at will, *Dunne v. Trustees of Schools*, 39 Ill. 579; *Wendell v. Johnson*, 8 N. H. 220; in *Anderson v. Prindle*, 23 Wend. 616, he is said to be at will or at sufferance. A reasonable distinction, it is thought, may be made between cases in which, after failure on the part of the tenant to comply with his contract and execute the lease, the landlord assents to the continuance of the tenant's possession, either in the hope that a lease may yet be executed, or because he is content to recover compensation in an action for use and occupation, and those in which the landlord manifests no such assent. For the time before the failure to execute the lease, however, it seems that the tenant's possession must be that of a tenant at will, for both his entry and possession, until breach of contract, are lawful.

Entry under Void Deed.

Where the tenant enters under a void deed it is held that his tenure is either at will or sufferance, *Ezelle v. Parker*, 41 Miss. 520.

Entry under Contract for Sale which is not Carried out.

In some cases where there has been a contract of sale, and the vendee has entered, and the contract has afterwards failed, he has been held a tenant at will, *Patterson v. Stoddard*, 47 Me. 355; *Jones v. Jones*, 2 Rich. 542; *Cheever v. Pearson*, 16 Pick. 266; *Manchester v. Doddridge*, 3 Ind. 360; *Den ex d. Edmonston*, 1 Ired. Law 152; *Foley v. Wyeth*, 2 Allen 131; *Towne v. Butterfield*, 97 Mass. 105; *Whitesides et al. v. Jackson ex d. Mumford*, 1 Wend. 418; in others quasi at will for certain purposes, *Blum v. Robertson*, 24 Cal. 127; *Chilton v. Niblett*, 3 Humph. 404; *Jackson ex d. Whitbeck v. Deyo*, 3 Johns. 422; while in others it has been denied that any tenancy whatever exists, *Tucker v. Adams*, 52 Ala. 254; *Dolittle v. Eddy*, 7 Barb. 74; *Stone v. Sprague*, 20 Id. 509. This subject will be found treated in the note to *Smith v. Stewart* and *Gould v. Thompson*, *infra*, page 252.

Mere Failure to Object to Occupancy will not Create Tenancy at Will.

A mere failure by the owner out of possession of his land to object to the occupancy thereof by another, will not alone create a tenancy at will, for to create such tenancy there must be an assent either express or implied on the part of the owner, and the implication of assent may be rebutted, *Martin v. Knapp*, 57 Iowa 336; and as the tenancy rests on the presumed consent of the landlord, when the presumption of consent is overthrown by proof, the estate at will cannot exist, *Garret v. Stormont*, 81 Mich. 636.

Tenancy at Will arising from Lease in Violation of Statute of Frauds.

In many States where a lease is made by parol for a time greater than that allowed to be so made by the Statute of Frauds, or what in the particular State takes its place, the resultant tenancy is held to be at will. Thus in Arkansas, Rev. Stat. (1874), § 2951, p. 561, Maine, Rev. Stat. (1871), Ch. 73, § 10, p. 560, Massachusetts, Stat. 1783, Ch. 37, § 1, Pub. Stat. (1882), Ch. 120, § 3, p. 732, *Inhabitants of Hingham v. Sprague*, 15 Pick. 102, *Ellis v. Paige*, 1 Id. 43, *Elliott v. Stone*, 1 Gray 571, *Kelly v. Waite*, 12 Met. 300, Missouri, Rev. Stat. (1879), Vol. 1, Ch. 35, § 2509, p. 420, *Kerr v. Clark*, 19 Mo. 132, *Ridgeley v. Stillwell*, 28 Id. 400, New Hampshire, Gen. Laws (1878), Ch. 135, § 12, p. 324, *Whitney v. Swett*, 22 N. H. 10, all leases; in New Jersey, Rev. 1877, p. 444, pl. 4, Stat. 1783, c. 37, § 1, all except leases not exceeding three years from the making of them; in South Carolina, all except

leases not exceeding one year from the time of entry, and in which the rent reserved to the landlord equals at least two-thirds of the full improved value of the demised property, Gen. Stat. (1882), § 2017, p. 587, are declared to be estates at will. The mere fact that rent is paid, the receipts for which show a payment by month or year, will not alter the estate taken. In Iowa, McClain's Ann. Stat. (1880), § 2014, p. 568, *Martin v. Knapp*, 57 Iowa 336, and Kansas, Comp. Laws (1879), § 2993, p. 520, there is a statutory presumption that any one in possession of realty with the assent of the owner, is a tenant at will until the contrary is shown. In Georgia, an oral lease within the Statute of Frauds creates an estate at will, but for the purpose of notice it is treated as from year to year, *Cody v. Quarterman*, 12 Ga. 386; a strict tenancy at will may, however, exist by the agreement of the parties. In Connecticut, a parole lease is presumably at will, but by implication becomes one from year to year; the implication will not, however, exclude all evidence of what was said at the time of making the lease, and which might explain the intention of the parties, *Larkin v. Avery*, 23 Conn. 304.

Policy of some States to Convert Estates at Will into Estates from Year to Year.

On the other hand, the policy in many States has been to convert estates at will into estates from year to year. In Indiana, the statute declares that a tenancy at will cannot arise in the absence of an express contract, Rev. Stat., § 5208, p. 1128; *Bright v. McQuat*, 40 Ind. 521. In Pennsylvania, tenancy at will is said to exist only nominally, *Clark v. Smith*, 25 Pa. St. 137; the tenancy at will, so called, in *Overdeer v. Lewis*, 1 W. & S. 90, it will be seen, on examination of the case, was a tenancy at sufferance and no more, as is pointed out by STROUD, J., in *Adams v. Adams*, 7 Phila. 160. And in *Hey v. McGrath*, 2 W. N. C. 419, the Supreme Court spoke of a lease "at will which under our decisions is a lease from year to year;" but from this it is not to be understood that estates at will are altogether excluded from Pennsylvania, as they can undoubtedly be created by the agreement of the parties; thus in *Potter v. Bower*, 2 W. N. C. 408, there was a lease for a time certain, "or so long as it shall be the will and pleasure of said lessor and no longer;" the lease also provided for sixty days' notice of its termination. It was held by the Court that the lease was a special contract whereby the lessee was to occupy the premises for a fixed period, and after the expiration thereof at will, and that the contract remained a lease at will notwithstanding a change of rent. LUDLOW, P. J., in delivering the opinion of the Court, said: "The tenant could not be ejected

except upon notice, and the length of time to which he agreed destroyed any construction of the lease which would turn the term into a tenancy from year to year, for it rebuts the construction of law by substituting for it the agreement of the parties." In Delaware, the code provides that no estate shall be held to be at will which can be construed to be held from year to year, Rev. Code (1874), Ch. 101, § 13, pp. 630-1. In Kentucky, the tendency is to strike down the old estate at will, but it may exist by contract, *Sullivan v. Enders*, 3 Dana 66; and see *Squires v. Huff*, 3 A. K. Mar. 17. In Tennessee, in *Duke v. Harper*, 6 Yerg. 280, the Court said that one who held without any special contract with the landlord as to time was "tenant at will, or from year to year." In North Carolina, in *Den ex d. Stedman v. McIntosh*, 4 Ired. 291, the Court quoted with approbation the rule of Lord KENYON, in *Martin v. Watts*, 7 Term R. 83, that wherever the relation of landlord and tenant exists without any limitation as to time, such tenancy should be regarded as from year to year; and held that the courts would lean against construing tenancies to be at will, while recognizing the fact that a tenancy at will might be created. And see *Humphries v. Humphries*, 3 Ired. 363.

In Rhode Island, notwithstanding the statute, Gen. Stat., Ch. 232, § 5, p. 648, which provides that "the time agreed upon in a definite letting shall be the time of the termination thereof; and if there be no time of termination agreed upon, it shall be deemed a letting from year to year," it is held that where there is an indefinite letting or occupancy without terms, the tenancy will be at will, and that the statute applies only when the letting is definite, except with regard to duration, *Johnson v. Johnson*, 13 R. I. 467. In the case cited a mother and son lived together as one family on land the title of which was in the mother, the son exercising the dominion over the land. There was no agreement with reference to rent or time of occupation. On account of difficulties with the son's wife the mother left and endeavored to obtain possession of the property. It was held the son was not tenant from year to year, but at will only.

Confusion of Tenancies at Will and at Sufferance.

In the District of Columbia, Congress, by Act of 4th of July, 1864, 13 Stat. at L. 383; Rev. St. D. C., §§ 680, 681, has, with regard to estates at will and by sufferance, performed a singular piece of jugglery, resulting in nothing but a change of names, which is well expressed by NOTT, J., in *Semmes v. The United States*, 14 Ct. of Cl. 493. "In a word the statute abolishes tenancy at will *eo nomine*, and immediately proceeds to create tenancy at will in substance; conversely, it declares all tenancies by holding over to

be tenancies by sufferance, and in the next section abolishes tenancies by sufferance and turns them into tenancies at will."

It may be noted here that what is called a tenancy at will in *Blatchley v. Coles*, 6 Col. 349, seems to be a mere tenancy at sufferance. In that case Coles and Blatchley took possession of land by virtue of purchase from those who had a naked possession, afterwards Stevens and another obtained a patent for the land, the Court held that this made Blatchley and Coles "tenants at will," and that they might have been entered upon at any time, and see *Overdeer v. Lewis*, 1 W. & S. 90.

One Entering in Defiance of Landlord Cannot be Converted at the Latter's Election into a Tenant at Will.

Where one enters in defiance of the landlord, the latter cannot, at his election, consider him as a tenant at will, *Wiggin v. Wiggin*, 6 N. H. 298; *Edmondson v. Kite*, 43 Mo. 176; *Henwood v. Cheeseman*, 3 S. & R. 500.

Tenancy at Will, unless Evidenced by Writing, begins on Tenant's Entry.

A tenancy at will, unless evidenced by writing, will begin only from the time the tenant obtains possession, *Den ex d. Pollock v. Kittrell*, 2 Tayl. 142; *Hardy v. Winter*, 38 Mo. 106; and the tenant takes the land in the condition it is at the time of his entry, and so will become entitled to crops then growing, *Martin v. Knapp*, 57 Iowa 336.

Tenant at Will not Liable Prior to Determination of Will to Trespass or Ejectment. Nature of his Possession.

The tenant at will prior to the determination of the will of either party is not a trespasser, and hence is not liable to ejectment or trespass, *Jones v. Jones*, 2 Rich. 542; *Doe ex d. Carson v. Baker*, 4 Dev. 220; his possession is a legal one, upon which he may maintain an action of forcible entry and detainer against a stranger who dispossesses him, *Jones v. Shay*, 50 Cal. 508; or trespass *quare clausum fregit* against one entering upon the land, *Gunsolus v. Lormer*, 12 N. W. Rep. 62; *Hilbourn v. Fogg*, 99 Mass. 11; *Hayward v. Sedgley*, 14 Me. 439; or he may bring ejectment, *Covert v. Morrison*, 49 Mich. 135. A question has been raised as to whether the possession of the tenant at will is so exclusive as to prevent the lessor from maintaining trespass against a stranger who intrudes upon premises held at will. The better opinion seems to be that the lessor cannot maintain such action, and that the fact that the possession of the tenant at will is of a precarious nature is not sufficient to make the case of his lessor an

exception to the general rule, which requires actual possession in the plaintiff to entitle him to maintain trespass. As said by LEWIS, C. J., in *Clark v. Smith*, 25 Pa. St. 137: "Why should a lessor at will be made an exception to the rule? The only reasons assigned are, first, that the possession of the tenant is the possession of the landlord, and, second, that the landlord's right to take immediate possession is equal to actual possession. There is nothing substantial in the first reason, because the authorities expressly declare that a constructive possession is not sufficient to maintain trespass, and because the argument proves entirely too much. The possession of every tenant, whether for years or at will, is by construction the possession of the lessor, and so the landlord might upon this principle maintain trespass in all cases without regard to the actual possession of his tenant or the duration of his term. The second reason is equally objectionable, because it would sustain trespass at the suit of a disseizee, and every other person who had a right of entry. Besides the lessor at will has not the absolute right, which has been supposed, to dispossess his tenant without notice and without giving him a reasonable time to take the emblements and remove his other property." And see *Campbell v. Arnold*, 1 Johns. 511; *Dean v. Comstock*, 32 Ill. 180; *Greber v. Kleckner*, 2 Pa. St. 291. The proper remedy for the landlord is therefore case, and that is maintainable by him only when the injuries are such as to affect his reversionary interest, 1 Chitty Pl. 175; he cannot recover nominal damages for a mere technical trespass, *Little v. Pollster*, 3 Greenl. 6.

The position above taken, and which seems to us to be most consonant to reason and the principles of law, has not, however, been invariably held. In *Starr v. Jackson*, 11 Mass. 519, the Supreme Judicial Court of Massachusetts, in a case where the question as to the form of action was distinctly raised, held that a lessor at will could maintain trespass where actual damage was done to the freehold. In the course of his opinion PARKER, C. J., said: "There can be no doubt that in the earliest times of which we have any judicial records trespass was considered the proper action for the proprietor of a freehold to bring when his trees were felled or his soil subverted or his building injured, notwithstanding the *locus in quo* were at the time occupied by a tenant at will." The learned Judge cited Rolls Abr. Tresp., n. 3, 4, Year Book, 19 Hen. VI.; Viner Abr. Tresp., Vol. 20, n. 3, 4, p. 462; Comyn's Dig., Tit. Tresp., B. 2, Vol. 7, p. 510; Co. Litt. 57 a, note 2, "the possession of the lessee at will is the possession of the lessor," 1 Saund. 322 a, note 5, referred to Chitty's position and the cases in 1 Johns. 511, and 3 Id. 468, as opposed to the decision of the Court, and made a distinction between the landlord of a tenant of years and the landlord of a tenant at will as to the right to bring trespass,

on the ground that the former had no right of entry. ' This case was followed in *The Inhabitants of Hingham v. Sprague*, 15 Pick. 102; *Lienow v. Ritchie*, 8 Id. 235; *Davis v. Nash*, 32 Me. 411; *Cushing v. Kenfield*, 5 Allen 307; and was recognized in *Ripley v. Yale*, 16 Vt. 257; but in *French v. Fuller*, 23 Pick. 104, WILDE, J., doubted whether, since the passage of the Revised Statutes giving the tenant at will a right to notice, the lessor could maintain trespass, since by those statutes the lessor's right of immediate entry, upon which the decision in *Starr v. Jackson* rested, was apparently taken away; and it is to be noted that even where it is held that the landlord may maintain trespass, the courts have not gone to the length of allowing him to maintain it for a technical trespass, but have required proof of actual damage to his freehold itself. See *French v. Fuller*, *supra*; *Little v. Pallster*, 3 Greenl. 6. In this latter case the injury complained of was the destruction of fences, etc., which had been erected by the tenant for his own convenience; it was held that the landlord could maintain no action.

In Iowa, that the lessor at will cannot bring trespass is recognized as the rule at common law; but under the Code of that State, which disregards forms of action, an action may be brought by the landlord against a trespasser, *Brown v. Bridges*, 31 Iowa 138.

Estate of Tenant at Will Not Transferable by Him.

The possession or estate of the tenant at will is not such as can be transferred or assigned by him; it is a mere holding at the will of both parties, and the transfer of the tenant would most satisfactorily demonstrate his intention to determine his will, *Cunningham v. Holton*, 55 Me. 33; *Austin v. Thompson*, 45 N. H. 117; *McCann v. Rathbone*, 8 R. I. 403; *Whittemore v. Gibbs*, 24 N. H. 484; *Dean v. Comstock*, 32 Ill. 180; *King v. Lawson*, 98 Mass. 309; *Cooper v. Adams*, 6 Cush. 87; and the assignee of the tenant at will who enters becomes liable to the landlord in trespass as a disseizor, *Cunningham v. Holton*, *Cooper v. Adams*, *supra*; but if the tenant at will make a lease for years this is a disseizin only at the election of the landlord, *Jackson ex d. Van Alen v. Rogers*, 2 Caines Cas. 314; S. C. 1 Johns. Cas. 33; and this holds as against a devisee of the fee, who may bring ejectment without notice, Id. As a consequence of this non-assignability it is held that where the owner of certain premises, who has rights in adjoining land as tenant at will, conveys his own premises, no rights in the land held at will pass by the conveyance, *Goodenow v. Allen*, 68 Me. 308. In that case the plaintiffs owned as personalty a building upon the land of another, and were tenants at will of the land upon which it stood. They also owned a building upon their own land which adjoined the land just mentioned.

The two buildings were so connected as to be used as one. The plaintiffs executed a mortgage of the building on their own land with the appurtenances. It was held that the right to occupy at will the other building and the land upon which it stood did not pass under the mortgage as "an appurtenance."

Estate at Will cannot be Taken in Execution.

Another consequence of the non-assignability of the estate at will is that it cannot be taken in execution. This is recognized by statute in California, Civil Code, § 5765, p. 684; Minnesota, Stats. (1878), Ch. XLV., § 5, p. 561; New York, 3 Rev. Stat. (1882), Pt. 2, Ch. 1, Tit. 2, Art. 1, § 5, p. 2175.

In Georgia, Estate at Will Assignable.

It is, however, held in Georgia that an estate at will which becomes so by virtue of a statute is assignable, *Cody v. Quarterman*, 12 Ga. 386.

Fact that Estate of Landlord is at Will cannot be Set Up to Avoid Payment of Rent.

While the estate at will is not assignable, the fact that a lessor is but a tenant at will cannot be set up by a sub-lessee to avoid payment of rent to his lessor, when he has not been interfered with by the superior landlord, and the lessor who is but tenant at will will not by that circumstance be released from responsibility upon his covenant for quiet enjoyment, *Holbrook v. Young*, 108 Mass. 83.

Estoppel of Tenant to Deny Landlord's Title Applies in Case of Estate at Will.

The possession of a tenant at will is such as will call into operation the rule of estoppel to deny the landlord's title, as between the tenant and lessor at will, *Ezelle v. Parker*, 41 Miss. 520; *Den ex d. Love v. Edmonston*, 1 Ired. Law 152; and also in favor of the tenant at will as against his sub-lessee; *Hilbourn v. Fogg*, 99 Mass. 11; *Coburn v. Palmer*, 8 Cush. 124; *Towne v. Butterfield*, 97 Mass. 105; but in *Hilbourn v. Fogg*, *supra*, it was held that a tenant at will of a tenant at will could maintain trespass *quare clausum fregit* against one who claimed under a subsequent written lease from such tenant at will. The reason for not applying the estoppel in that case given by GRAY, J., was that the tenant at will could not "make a valid alienation by written lease which would give Fogg a better title than she had pre-

viously granted to the plaintiff; . . . because while if the landlord had had a fixed estate his lease would have been a termination of the previous will, yet being only at will he could pass no estate." The doctrine of this case was sustained in *Palmer v. Bowker*, 106 Mass. 317, where the second lessee sued the original subtenant at will in an action for use and occupation. The position, however, does not seem to us strictly logical or well taken. If the subtenant at will is allowed to attack his landlord's title for the purpose of overthrowing his second lease, why not for all purposes—for it is just as much a cause of forfeiture of an estate at will to assign the possession in one way as in another—and so justify himself in refusing to pay rent or in retaining possession against his lessor after the latter had determined his will in any other manner? And yet to hold that he could so do would be at once and apparently repugnant to both law and the common ideas of justice; by taking a lease at will, or becoming tenant at will, the subtenant admits the right of his lessor to create just such a tenancy as is created by the contract between them, and he knows that one of the methods by which a tenancy at will is terminable by the lessor is by making a written lease for a definite time to a third person; if, then, notwithstanding this knowledge, he is permitted to say to his landlord, "You had no right to assign your own tenancy or to make a sub-lease, because thereby your own right in the property would cease," it would certainly seem as if, while destroying the estate granted to the third person, he cut away the foundation upon which his own rested, namely, the dominion of his grantor, which he is estopped to deny. But on another ground the decision does not seem sound. As we shall see hereafter, even an assignment of an estate at will works a forfeiture only at the election of the original lessor,—and a sub-lease, it would seem, should be at least as favorably regarded as an assignment, the possession of the tenant being that of the landlord,—and so until the superior landlord has exercised his election, there would be no right in the subtenant either to assume that forfeiture would be enforced or to set up a violation of the terms of his immediate landlord's tenure. If the forfeiture should be enforced, of course a different state of facts would be presented, and of course then the subtenant might show that his landlord's estate had expired, under the familiar exception to the rule of estoppel to deny the landlord's title.

Tenant at Will Liable for Use and Occupation.

Where no special rent is reserved or agreed upon between the parties, and there is no understanding that the occupation shall be rent free, the tenant at will is liable in an action for use and occupation of the land.

This liability continues not only during the actual and physical, but during the constructive possession of the tenant, *Hall v. Western Transportation Co.*, 34 N. Y. 284. This case is a badly reported one, but it appears from the dissenting opinion of LEONARD, J., that the lease was a verbal one for three years. The Court in delivering its opinion, after citing *Little v. Martin*, 3 Wend. 219, and *Featherstonhaugh v. Bradshaw*, 1 Id. 134, quoted the remarks of TINDAL, C. J., in *Izon v. Gorton*, 5 Bing. N. S. 501, as follows: "The statute, 11 Geo. II., Ch. 19, enables landlords to recover a reasonable satisfaction for lands held or occupied, from which it seems to follow that if there is an actual *holding*, and the power to occupy or enjoy is given by the landlord to the tenant so far as depends on the landlord, the action is maintainable." And continued: "In *Pinero v. Judson** the Chief-Justice thus expresses himself, 'according to the statute if he *holds* or occupies he may be sued in an action for use and occupation, and we find that he holds.' BURROUGH, J., in the same case, says: 'Actual occupation is not necessary; legal possession is sufficient.' GAZLEE, J., says: 'Parties have been repeatedly held liable in actions for use and occupation, although there has not been actual occupation for the whole of the time in respect to which the action has been brought.'" The Court then considered the effect of the revision of 1813 of the laws of the State of New York, and held that the statute of George II. had been reenacted by the 1 Rev. Laws 444, and further that the law so established was not changed by the Revised Statutes, although there was some difference in phraseology between the two enactments; that of the earlier being, "It shall be lawful . . . to recover a reasonable satisfaction . . . for lands *held or occupied* by the defendant;" and that of the later being, "Any landlord may recover in an action for the use of any lands or tenements by any person under any agreement not made by deed."

Tenant at Will Liable for Voluntary Waste.

The tenant at will must not waste the premises held by him, *Lyford v. Putnam*, 35 N. H. 563; *Phillips v. Covert*, 7 Johns. 1; *Daniels v. Pond*, 21 Pick. 367; and for voluntary waste he is liable in trespass, *Phillips v. Covert*, 7 Johns. 1, Litt., Sect. 71; *Perry v. Carr*, 44 N. H. 120, or in case in the nature of waste, *Freeman v. Headley*, 33 N. J. Law 523; but he is not liable for mere permissive waste, Co. Litt., Sect. 57 a; *Moore v. Townsend*, 33 N. J. Law 284, in which case DEPUE, J., pointed out the reason for the exemption of the tenant at will from the rule applied to termors. "Tenants at will were always considered as omitted from the statute of Marlborough, as well as from the statute of Gloucester, and therefore

* 6 Bing. 206.

continued to be punishable for mere permissive waste and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester is attributable to the fact that the owner of the inheritance might at any time by entry determine the estate of the tenant, and thus protect the inheritance from spoil or destruction."

It is hardly necessary to remark that a tenant at will may, by his express contract, render himself liable for permissive, as well as for voluntary, waste—but in that case his liability rests on his contract and not on his tenancy.

Tenant at Will Entitled to Emblements.

A tenant at will is entitled to emblements, *Davis v. Brocklebank*, 9 N. H. 73, where the estate is determined by the landlord, *Davis v. Thompson*, 13 Me. 209; *Reilly v. Ringland*, 39 Iowa 106, 44 Id. 422; *Simpkins v. Rogers*, 15 Ill. 397; *Brown v. Thurston*, 56 Me. 126, or by the death of the tenant, *Reilly v. Ringland*, *supra*; and in *Currier v. Curl*, 13 Me. 216, it is held that the tenant is entitled to emblements where he has himself, of his own will, determined the tenancy; and to the same effect is *Morgan v. Morgan*, 65 Ga. 493; but this is contrary to the law as stated in *Brown v. Thurston*, *supra*; *Chandler v. Thurston*, 10 Pick. 205; *Carpenter v. Jones*, 63 Ill. 517; and *Harris v. Frink*, 49 N. Y. 24, and to the general principle upon which the common law gives emblements to a tenant, namely, that he who has borne the burden should not, without fault of his own, be deprived of the profit.

Determination of Estate at Will. Demand of Possession.

Whatever determines the will of either party to the tenancy puts an end to the estate at will, for by its very definition it is at the will of both parties, and depends for its existence on their mutual acquiescence. Thus a demand of possession by the lessor, *Dunne v. Trustees of Schools*, 39 Ill. 578; *Herrell v. Sizeland*, 81 Ill. 457; *Den ex d. Howell v. Howell*, 7 Ired. Law 496, or anything which amounts to a demand, although not formally or precisely expressed, *Chamberlin v. Donahue*, 45 Vt. 50, will terminate the estate. As where no fixed time of notice to quit has been provided by statute, a general notice to quit, *Dame v. Dame*, 38 N. H. 429; *Whitney v. Swett*, 22 N. H. 10; and see *Nowell v. Wentworth*, 58 N. H. 319.

Ejectment. Entry.

Bringing an action of ejectment for the premises is a sufficient termination of the will, *Chamberlin v. Donahue, supra*; *Blum v. Robertson*, 24 Cal. 127; so recovering the land against the lessee, *Hatstat v. Packard*, 7 Cush. 245; so where the lessor makes an entry to revest his possession, *Curl v. Lowell*, 19 Pick. 25; *Moore v. Boyd*, 24 Me. 242; but the entry must be made *animo clamandi*, see *Holly v. Brown*, 14 Conn. 255; and if words are relied upon to show the animus, they will not have effect so as to render the tenant a trespasser until they are brought to his notice, *Cook v. Cook*, 28 Ala. 660. An entry by the mortgagee upon the mortgagor will determine the latter's estate at will, *Hill v. Jordan*, 30 Me. 367.

Sale or Conveyance of Land by Landlord.

The estate is terminated where the lessor sells or conveys the demised premises, *Den ex d. Howell v. Howell*, 7 Ired. Law 496; *Jackson ex d. Phillips v. Aldrich*, 13 Johns. 106; *Alton v. Pickering*, 9 N. H. 494; *Winter v. Stevens*, 9 Allen 526; *Dame v. Dame*, 38 N. H. 429; and the deed will be sufficient to enable the grantee of the reversion to maintain ejectment without making an actual entry, *Matthews v. Ward's Lessee*, 10 G. & J. 443; and if the tenant has actual notice of the conveyance it is not necessary as against him that it be recorded, *M'Farland v. Chase*, 7 Gray 462.

The tenant has no right to inquire into the consideration of the conveyance by the lessor, and cannot show that it was made for the purpose of terminating the estate at will, so as to evade a statute requiring notice to quit to be given to the tenant, *Curtis v. Galvin*, 1 Allen 215.

Where all the members of a partnership made a conveyance to a new firm consisting of themselves and one other person, it was held that there was such a conveyance as would determine an estate at will held from the partnership, *M'Farland v. Chase, supra*.

If the lessor at will make a lease of the demised property to a third person for a definite time, the estate at will is determined, *Casey v. King*, 98 Mass. 503; *Hildreth v. Conant*, 10 Met. 298; this position seemed in *Kelly v. Waite*, 12 Met. 300, to be slightly modified, and the condition that the new lease should commence immediately to be added; but in *Pratt v. Farrar*, 10 Allen 519, the Court held that the lease at will was determined by a written lease, although it contained a provision that no rent should be claimed until the lessee was in actual possession.

Before the lessee by writing can recover possession from the tenant at will he must give to the latter notice of the lease, *Furlong v. Leary*, 8 Cush. 409.

In general it may be said that any act of the landlord which is inconsistent with the continuance of the estate at will, terminates the estate, *Blum v. Robertson*, 24 Cal. 127.

Determination of Will by Lessee. Abandonment. Disclaimer.

The estate may be determined by the action of the lessee; thus where the lessee abandons the premises, *Say v. Stoddard*, 27 Oh. St. 478; *Chandler v. Thurston*, 10 Pick. 205; *Carpenter v. Jones*, 63 Ill. 517; or where he disclaims holding of the landlord, or in any way denies his landlord's title, he may be treated as a trespasser, *Den ex d. Love v. Edmonston*, 1 Ired. Law 152; or where the lessee deals or treats with the land as his own; thus in *Campbell v. Proctor*, 6 Greenl. 12, the tenant at will suffered an extent of the land held by him as his own, and did not notify the levying officer or the creditor that it was not his, but stood by and pointed out the land to them; this conduct was held a determination of the will; so where the tenant does anything inconsistent with his tenure, as where he receives and records a deed from a stranger, *Bennoch v. Whipple*, 12 Me. 346. So it is said where the tenant makes a sublease or assignment, his estate is terminated, *Cooper v. Adams*, 6 Cush. 87; but this must be qualified by the statement that such termination is at the election of the landlord, *Cook v. Cook*, 28 Ala. 660; *Grundin v. Carter*, 99 Mass. 15.

Waste.

The tenant at will may also lose his estate by the commission of waste, *Daniels v. Pond*, 21 Pick. 367; *Harris v. Frink*, 49 N. Y. 24; *Perry v. Carr*, 44 N. H. 120.

Breach of Condition.

The estate will also be terminated by the breach of a condition upon which it is held, *Creech v. Crockett*, 5 Cush. 133; or the happening of an event upon which it was contingently limited.

Death of Lessor or Lessee.

The death of the lessor will determine the estate, *Reed v. Reed*, 48 Me. 388; *Manchester v. Doddridge*, 3 Ind. 360; *Rising v. Stannard*, 17 Mass. 282; *Say v. Stoddard*, 27 Oh. St. 478; so will the death of the lessee, *Rising v. Stannard*, *supra*; *Robie v. Smith*, 21 Me. 114; *Say v. Stoddard*, *supra*; or if the lessor is a corporation, its dissolution, *Lea v. Hernandez*, 10 Tex. 137; or

the death of the lessor and a conveyance of the demised premises by his heirs, *Theological Institute Company of Connecticut v. Barbour*, 4 Gray 329. The termination of the estate at will by the death of the lessee is absolute, and not only as between him and his lessor, and therefore an action pending at the time of his death by a tenant at will to regain possession of the estate, from which he has been forcibly ejected by a person who continues to hold without right, will abate, *Ferrin v. Kenney*, 10 Metc. 294; and it is held in Massachusetts that it is not kept alive by the provisions of a statute (Rev. St. (1835), Ch. 93, § 14), which provides that the "heir" of a plaintiff may maintain the real and mixed actions to which his ancestor was entitled, for the statute must be held to apply only to rights which were transmissible, *Id.*

But if there be co-lessors or co-lessees at will, and one of the lessors or one of the lessees die, the will is not determined, Co. Litt. 55 b; and so if a husband and wife make a lease of the wife's land at will, and the husband die, the will continues, *Id.*

The rule that death will terminate the will is so absolute that even if the lease is to the lessee and his heirs at the will of the lessor, and the lessee die, the heir on entering becomes a trespasser, Co. Litt. 62 b.

The estate may also be determined in several of the States by notice given under the provisions of statutes, as will be noted below.

Tenant at Will not Entitled at Common Law to Notice to Quit.

At common law the tenant at will is entitled to no notice to quit, properly so called, *Ruhl v. Beard*, 13 East 210; *Doe ex d. Bastow v. Cox*, 11 Q. B. 122; *Doe ex d. Tones v. Chamberlaine*, 5 M. & W. 14; *Doe ex d. Rogers v. Pullen*, 2 Bing. (N. S.) 749; *Withers v. Larrabee*, 48 Me. 570; *Davis v. Thompson*, 13 Id. 209; *Doe ex d. Carson v. Baker*, 4 Dev. 220; *Herrill v. Sizeland*, 81 Ill. 457; *Willison v. Watkins*, 3 Pet. 43; *Johnson v. Johnson*, 13 R. I. 467; *Venable v. M'Donald*, 4 Dana 337; *Harrison v. Middleton*, 11 Gratt. 537; *Den Lessee v. Webster*, 10 Yerg. 513; *Rich v. Bolton*, 46 Vt. 84; *Den ex d. Humphries v. Humphries*, 3 Ired. Law 362.

In Massachusetts the law was so held in *Ellis v. Paige*, 1 Pick. 43; but in that case JACKSON and PUTNAM, JJ., dissented, the latter delivering an opinion, which is reported in a note to *Coffin v. Lunt*, 2 Pick. 70; and in *Coffin v. Lunt*, PARKER, C. J., considered the question of the tenant's common law right to notice to quit to be still an open one in Massachusetts.

In New York the decisions prior to the revised statutes were fluctuating; in *Jackson ex d. Van Alen v. Rogers*, 2 Caines Cas. 314; 1 Johns. Cas. 33; *Jackson ex d. Van Denberg v. Bradt*, 2 Caines 169, it was held that the ten-

ant had no right to notice; but in *Jackson ex d. Livingston v. Bryan*, 1 Johns. 322 (followed in *Jackson ex d. Locksell v. Wheeler*, 6 Johns. 272), where the tenant had been in possession for a long time, the Court held he should be treated as a tenant from year to year, and entitled to notice to quit; from this decision THOMPSON, J., dissented. In the next case, *Jackson ex d. Benton v. Laughhead*, 2 Johns. 75, LIVINGSTON, J., laid down the broad general proposition that "no person who holds land by another's consent for an indefinite period ought ever to be evicted by ejectment at the suit of such party without previous notice to quit." KENT, C. J., SPENCER and TOMPKINS, JJ., concurred, THOMPSON, J., dissented. This case was followed in *Jackson ex d. Carr v. Green*, 4 Johns. 186; but in *Jackson v. Fuller*, Id. 215, the Court limited the generality of the position, and held that it would not apply against the assignee of a mortgage, on the ground of want of privity, in other words, the Court held that the consent to occupy must be actual and not constructive in order to entitle the tenant to notice to quit. In subsequent cases there was a general tendency to regard the tenant at will for the purpose of notice to quit as a tenant from year to year. See *Philips v. Covert*, 7 Johns. 4; *Jackson ex d. Church v. Miller*, 7 Cow. 747; *Nichols v. Williams*, 8 Id. 13; except where the tenant had entered under a contract of sale, *Jackson ex d. Phillips v. Aldrich*, 13 Johns. 106; *Jackson v. Kingsley*, 17 Id. 158; *Whiteside et al. v. Jackson ex d. Mumford*, 1 Wend. 418; *Jackson ex d. Shipley v. Moncrief*, 5 Wend. 26. In *Jackson ex d. Livingston v. Niven*, 10 Johns. 335, one who had entered under contract of sale was held entitled to notice to quit, but in that case a rent was reserved; notice to quit was also held necessary in *Jackson ex d. Ostrander v. Rowan*, 9 Johns. 330, a case of entry under contract of sale. From these authorities it would appear that the statement of SAVAGE, C. J., in *Jackson ex d. Church v. Miller*, 7 Cow. 747—"The general rule here is that tenancies at will are to be considered tenancies from year to year merely for the sake of a notice to quit (4 Cow. 350); but this seems to be subject to the exception of a tenancy at will created by an entry under a contract to purchase"—correctly states the law of New York prior to the Revised Statutes, yet in *Larned v. Hudson*, 60 N. Y. 102, the Court of Appeals said that prior to the Revised Statutes the tenant at will was not entitled to notice to quit.

It may also be noted that another exception to Chief-Justice SAVAGE's rule may be found in *Jackson ex d. Phillips v. Aldrich*, 13 Johns. 106, where it was held that a vendor remaining in possession after a sale was not entitled to notice to quit.

Tenant Allowed Reasonable Time to Quit.

But while the common law gave the tenant at will no right to a notice to quit, it did not hold him as a trespasser *eo instanti* the will was determined, and it seems settled that he should have a reasonable time within which to remove, *Ellis v. Paige*, 1 Pick. 43; *Leavitt v. Leavitt*, 47 N. H. 329; *Prickett v. Ritter*, 16 Ill. 96; *Rich v. Bolton*, 46 Vt. 84; *Davis v. Thompson*, 13 Me. 209; what is a reasonable time will depend on the circumstances of the case; see *Ellis v. Paige, supra*; *Nowell v. Wentworth*, 58 N. H. 319; and the reasonable time may be fixed by the agreement or writing creating the tenancy at will without destroying the character of the estate, *Say v. Stoddard*, 27 Oh. St. 478.

Statutory Variation of Common Law Rule.

The law as to termination of estates at will has been in many of the States very materially altered, by statutes providing that a certain notice shall be necessary to determine an estate at will. In New Hampshire, Gen. Laws (1878), Ch. 250, § 1, p. 575, and Rhode Island, Pub. Stat. (1882), Ch. 232, § 1, p. 648, the enactments are merely that a notice in writing must be given to quit on a day named. This would not seem to materially vary the common law with regard to termination of the estate by demand of possession. In Rhode Island, Ch. 232, § 4, a like notice is required from the tenant before quitting; this would seem merely to take away the right of abandonment.

In Florida, the tenant at will is removable upon three days' demand of the possession of the premises. Laws (McClellan, 1881), Ch. 137, § 18, p. 704.

In Iowa, McClain's Ann. Stat. (1880), § 2015, p. 569; Kansas, Comp. Laws (1879), § 2996, p. 520, the estate at will is terminable upon thirty days' notice. The rule is the same in Maine, except where the tenant is liable to pay rent and none is due on the expiration of the notice, in which case the thirty days shall be made to expire on a rent day, Rev. Stat. (1883), Ch. 94, § 2, p. 786.

In California, Civil Code, § 789 (5789), p. 685; Indiana, Rev. Stat. (1881), § 5207, p. 1128; Kentucky, Gen. Stat. (Bull. & Fel., 1881), Ch. 66, Art. VI., § 1, p. 609; Maryland, Rev. Code (1878), Art. 67, VII., § 1, p. 703; Missouri, Rev. Stat. (1879), § 3077, p. 514; New York, Rev. Stat. (1882), Pt. 2, Ch. 1, Tit. IV., § 4, p. 2201; Wisconsin, Rev. Stat. (1878), § 2183, p. 629, the time fixed for the notice is one month.

In New York it has been held that the notice need not specify a day upon which the tenant shall quit the premises, and that where a notice

has specified a time, as one month from the day on which it was expected the notice would be served, and the notice has not been served on that day, the tenancy will nevertheless terminate one month after the day of service, *Burns v. Bryant*, 31 N. Y. 453.

In Georgia, the time of notice is one month, Code (1882), § 2291, p. 561.

In Delaware, Rev. Code (1874), Ch. CL., § 15, p. 630; Massachusetts, Pub. Stat. (1882), Ch. 121, § 12, p. 736; Michigan, How. Ann'd Stat., § 5774, p. 1500; *Huyser v. Chase*, 13 Mich. 98; *Williams v. Hodges*, 41 Id. 695; New Jersey, Stew. Rev., p. 575, Pl. 27; Oregon, Miscell. Laws, Ch. 17, Tit. III., § 34, p. 588, the estate at will is terminable upon three months' notice.

In Pennsylvania, where there is a demise at will, and a certain rent is reserved, the landlord may obtain possession upon giving three months' notice to quit, Pur. Dig., p. 879, Pl. 17. This act does not apply to a tenancy at will where no rent is reserved, *Blashford v. Duncan*, 2 S. & R. 480; or where the rent is uncertain, as services to be rendered as fore-singer and organist to a religious society, *Hohly v. German Reformed Society*, 2 Pa. St. 293.

It is provided in Iowa, Kansas, Massachusetts, Minnesota, Oregon, Michigan, Wisconsin, statutes, *supra*, Delaware, Rev. Code (1874), Ch. CXX., § 4, p. 707; and Indiana, Rev. St. (1881), § 5209, p. 1128, that where a rent is reserved, payable at intervals shorter than the time prescribed by statute for a notice to quit, a notice equal in length to one such interval shall suffice.

The effect of the passage of these acts giving a notice to quit, and proceedings to enforce compliance therewith, to tenants of estates at will, has been the subject of some discussion. It has been said in Maine that the statutory method of termination of estates at will is exclusive of all others, *Withers v. Larrabee*, 48 Me. 570; *Cunningham v. Horton*, 57 Id. 422; but other cases have limited the generality of expression of those just cited, and have distinguished between estates at will by the express agreement and contract of the lessor and lessee and those made at will by a statute, as where a statute has declared all parol leases to give estates at will, and have confined the exclusive character of the statutory mode of termination to estates at will of the latter class, *Esty v. Baker*, 50 Me. 325; *Young v. Young*, 36 Id. 133; and estates at will at common law may still be determined in the common law fashion, as by operation of law resulting from the conveyance of the fee, *Esty v. Baker*, *supra*.

In Massachusetts, the statute of which State is similar to that of Maine, in the case of *Whitney v. Gordon*, 1 Cush. 266, it was said that a tenancy

at will could be determined only according to the statute; but the scope of this remark was restricted in *Howard v. Merriam*, 5 Cush. 563, wherein SHAW, C. J., said: "The remark alluded to was not an abstract proposition embracing all modes of terminating a tenancy at will, but it was made in a case where the question was between lessor and lessee, and how either could terminate the estate as against the other by his own act. It had no relation to the question touching the determination of an estate at will by the act and operation of the law;" and the Court held that, notwithstanding the statute, a conveyance of the fee by the lessor, made *alieno intuitu*, would still have the effect of determining the estate at will. The Court expressly left open the question of what would have been held to be the law had the conveyance been made for the purpose of avoiding the lease at will; but in view of the subsequent decision in *Curtis v. Galvin*, 1 Allen 215, that the tenant would not be permitted to show that the conveyance was made for that purpose, it would seem that a distinction arising from the purpose of the conveyance can hardly be made. It is to be noticed that *Howard v. Merriam* was the case of an estate at will not so declared by statute, but one arising at common law; *Kelly v. Waite*, 12 Met. 300, however, was a case of a parol lease becoming a lease at will through the operation of the Statute of Frauds, and it was held that the will was determined by a feoffment, or a lease for years to begin immediately. See also *Benedict v. Morse*, 10 Met. 233; *Casey v. King*, 98 Mass. 503.

From the statutory method of proceeding it results that where a notice is given the tenancy will continue until the expiration of the time named in the statute, *Withers v. Larrabee*, 48 Me. 570; *Smith v. Rome*, 31 Me. 312; and hence, until the expiration of such time, the notice provided in the statutes of forcible entry and detainer cannot be given, *Dutton v. Colby*, 35 Me. 505; and see *Martin v. Splivalo*, 56 Cal. 128; and if the landlord enter before the notice has expired he is a trespasser, *Cunningham v. Horton*, 55 Me. 33; and hence also the liability of the tenant for rent will continue up to the expiration of the notice; and it has been held that if the tenant quit the premises without notice he will be liable for rent during the time it would have required for him to have properly ended his tenancy according to the statute, *Whitney v. Gordon*, 1 Cush. 266; *Walker v. Furbush*, 11 Id. 366; and it has also been held that where he so quits without notice his liability will extend beyond the period indicated in the foregoing cases, *Rollins v. Moody*, 72 Me. 135.

The existence of the statute requiring notice to terminate an estate at will does not prevent the parties to the tenancy from terminating it in any manner they may please by agreement, *Forbes v. Smiley*, 56 Me. 174; *Farson v. Goodale*, 8 Allen 202; but where it is claimed that tenancy has

been determined by mutual consent the burden of proof is on the party setting up such claim, *Thomas v. Sandford Steamship Co.*, 71 Me. 548.

The statutory notice may be dispensed with by the terms of the creation of the particular estate at will; but in *Woodrow v. Michael*, 13 Mich. 187, where there was a lease at a monthly rent with an understanding that the tenant should yield possession whenever the landlord wanted the premises, it was held that the tenant was entitled as tenant at will to the statutory notice.

A condition may be attached to the tenancy which will have the effect of doing away with the statutory notice, *Creech v. Crockett*, 5 Cush. 133, as that the payment of rent quarterly in advance shall be a condition, and that on failure to pay the tenant shall leave; in this case the tenant having failed to pay may be dispossessed without notice to quit, *Elliott v. Stone*, 1 Gray 571; but a mere agreement to pay in advance will not constitute a condition upon failure to comply with which the tenancy will be terminated without notice, *Elliott v. Stone*, 12 Cush. 174; *Sprague v. Quinn*, 108 Mass. 553.

In Maine it has been questioned whether such a conditional estate at will can be lawfully and effectively created, see *Goodenow v. Allen*, 68 Me. 308.

Where notice is required by statute, it will be necessary as well in cases where possession is sought by proceedings at common law as those in which it is sought through statutory proceedings, *Leavitt v. Leavitt*, 47 N. H. 329.

If the landlord terminate the will in the midst of a period for which rent is reserved he cannot recover rent for the unexpired portion of such period, *Cameron v. Little*, 62 Me. 550; *Fuller v. Swett*, 6 Allen 219.

On Determination of Will, Tenancy becomes at Sufferance.

After the will is determined the tenant becomes a tenant at sufferance, *Hollis v. Pool*, 3 Metc. 350; *Rising v. Stannard*, 17 Mass. 282; *Esty v. Baker*, 50 Me. 325; *Emmes v. Feeley*, 132 Mass. 346; and after demand of possession a trespasser, *Bolton v. Landers*, 27 Cal. 104; *Smith v. Shaw*, 16 Cal. 88; but where the will is determined by a notice to quit upon a day agreed upon by the parties the tenancy becomes one for a fixed term for the time intervening between the notice and the day agreed upon, *Engels v. Mitchell* (Supreme Court of Minnesota), 14 N. W. Rep. 510; and where the estate is terminated by an event of which the tenant has not knowledge, *e. g.* the death of the lessor in foreign parts, the mere holding over will not constitute the tenant a trespasser, *Rising v. Stannard*, *supra*.

Right of Tenant after Determination of Will that of Ingress and Regress Only.

The sole right of the tenant after the termination of the will is that of ingress, egress, and regress to take care of and remove his property, and emblements where he is entitled to them, and he has no right during the reasonable time allowed him for the above-mentioned purposes to carry on his ordinary business on the premises, *Moore v. Boyd*, 24 Me. 242; *Den ex d. Love v. Edmonston*, 1 Ired. Law 152; and the right to take his emblements gives him no right of possession of the premises, but merely the right of ingress and regress so far as is necessary to give due attention to the growing crops and to remove them when cut, *Den ex d. Humphries v. Humphries*, 3 Ired. Law 362.

Tenancy from Year to Year.

LESLEY AND ANOTHER v. RANDOLPH.

Supreme Court of Pennsylvania, Philadelphia, February 11, 1833.

[Reported in 4 Rawle 123.]

A lease for no determinate period of time, but by which an annual rent is reserved, payable quarterly, is a lease from year to year, so long as both parties please. It is binding on the parties prospectively for one year only, capable, however, of being extended to a second, third, fourth or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months previous notice to that effect, but at no time before the close of a year, after it has once commenced.

Consequently, where the tenant continues to hold the demised premises until after the commencement of the second year, without offering to surrender the possession to the landlord, or receiving from him notice to quit, he is entitled to hold for another year in despite of the landlord, but at the same time is bound to pay the year's rent quarterly, according to the agreement.

THIS was a writ of error to the District Court for the City and County of Philadelphia.

The plaintiffs in error, Robert Lesley and William Meredith, trading under the firm of Lesley & Meredith, were defendants below, in an action brought against them by the defendant in error, George F. Randolph, to recover part of a year's rent claimed under the circumstances set forth in the following case stated :

CASE STATED.

"The plaintiff as owner of the store or warehouse No. 241 High street, in the city of Philadelphia, leased the same to the defendants on the 23d day of April, 1828, according to the terms of the following agreement, executed by the defendants, and assented to by the plaintiff, viz.

"We have this day rented of George F. Randolph, the store or warehouse No. 241 High street, the rent to be eight hundred dollars per annum, payable quarterly. It is expressly understood and agreed by

us, that we are not to relet the premises, or any part thereof, to any person, or for any purpose or business, without the approbation and consent of George F. Randolph.

(Signed)

LESLEY & MEREDITH.

'PHILADELPHIA, April 23, 1828.'

"The defendants immediately after the execution of this agreement, entered upon the premises and continued to occupy the same till July 23, 1829, when they removed, having paid all the rent due at that time, and thereupon tendered the key of said store or warehouse to the plaintiff, who refused to receive it.

"On the first day of December, 1829, by the mutual consent of the plaintiff and defendants, and without prejudice to the rights of either party, the said store or warehouse was let to a third person.

"If the Court be of opinion that the plaintiff had a right to consider the defendants as tenants of the premises for a second year, in consequence of their retaining possession under the above agreement of April 23, 1828, after the expiration of the first year as above mentioned, judgment is to be entered for the plaintiff for two hundred eighty-four dollars, forty-five cents, and for interest on the same from December 1, 1829, till the rendering of judgment, with costs of suit; otherwise judgment is to be entered for defendants with costs of suit; either party to be entitled to a writ of error."

The District Court gave judgment for the plaintiff for three hundred and nineteen dollars and ten cents, and the defendants removed the cause to this Court by writ of error.

Chauncey, for the plaintiffs in error.—The lease set out in the case stated, is either a lease for a year or for a quarter only. Whether it be one or the other is immaterial to the plaintiffs in error, for in either view of it, the judgment of the Court below is erroneous. If the demise was for a year, then, according to the case of *Logan v. Herron*, 8 Serg. & Rawle 459, upon notice given before the expiration of the first quarter of the second year the tenants might have been dispossessed by the landlord, and of course they had a right to quit at the time they did, or there would be a want of reciprocity in the obligations of the parties.

If the demise was for a quarter, it is equally plain that the tenants, having surrendered the property leased, and tendered the stipulated

quarterly rent before entering upon the second quarter of the new year, were discharged from all further liability to the landlord. They had a right, if the lease was to endure for so short a term, to leave the premises at the end of the first quarter, or of any subsequent one. Such being the agreement of the parties, the landlord asked too much, when he demanded payment beyond the period for which the rent was tendered, and the Court below erred in the judgment which gave it to him.

Stroud for the defendant in error.—The lease in this case was not for a definite period; it was not for a single year, or for any portion of a year, but was without limitation as to time, which, by construction of law, is a lease from year to year. A general taking at an *annual* rent, is a lease from year to year. Chamb. Land. and Ten. 355. Comyn's Land. and Ten. 8. 91. 303. 2 Bl. Com. 147. *Right v. Darby*, 1 T. R. 161. The decision in *Logan v. Herron*, which is supposed to interfere with the judgment of the Court below, was the case of a lease for a *fixed period*, "for one year from the 1st of April, 1816," and the language of the Court cautiously restricts the decision to such a case. "Where the termination of a lease is uncertain," says C. J. Tilghman, 8 Serg. & Rawle 461, "and depends upon the will of the landlord, it is necessary that notice should be given during the lease. As where a lease is made for a year, and so from year to year as long as it pleases the landlord, or as long as it pleases both parties, if the landlord wishes to determine the lease, he must give notice three months before the expiration of the year." The same distinction is asserted by Judge Gibson, in page 470. The earlier case of *Bedford v. M'Elherron*, 2 Serg. & Rawle 49*-50*, is to the same effect. *Diller v. Roberts*, 13 Serg. & Rawle 60, which is the last reported decision of our Courts upon the doctrine of an implied renewal of a lease, by the holding over of the tenant, and the omission of notice to quit by the landlord, contains nothing in opposition to what is contended for by the defendant in error, but is rather confirmatory of his views.

The opinion of the Court was delivered by

KENNEDY, J.—It has been contended for the plaintiffs in error, that the agreement under which they took the warehouse, amounted only to a specific letting for one year, and no more; and that according to the decisions of this Court, in the case of *Boggs v. Black*, 1 Binn. 335, and

Logan v. Herron, 8 Serg. & Rawle 459, they became immediately upon the expiration of the year, to wit the 23d of April, 1829, tenants at sufferance, liable to be turned out of possession at will of the defendants in error; and were not bound therefore to pay for the use of the warehouse after that, longer than they continued to occupy it; and were at liberty to surrender the possession at any moment they pleased. The nature of the lease in the latter of the above cited cases has been relied on as being substantially the same with the lease in the present case.

I however think there is a difference which has been recognized by courts, judges, and writers on this branch of the law. In *Logan and Herron* the lease was *specifically* for one year. Nothing appears on the face of it from which any possible inference could be drawn, that it was within the contemplation of the parties that it should endure beyond that time. If either party therefore became desirous, at or before the expiration of the year expressly agreed on, to continue the relation of landlord and tenant beyond that period, he surely had no reason to calculate upon it without first knowing the will of the other party in respect to it, and if he did not choose to take the trouble of informing himself, I do not see any good reason he could afterwards have to complain that the other party, without giving him three months' notice previously to the expiration of the year of his intention, had resolved to decline all further renewal of the lease. It seemed to be established in *England*, as well as here, that when a lease or demise is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term; and it is not material whether it be only for a single year, or any longer period. See Chamber's Landlord and Tenant, 750. *Jordan v. Ward*, 1 H. Bl. Rep. 97. *Godsell v. Inglis*, 3 Taunt. 54; Bing.'s Landlord and Tenant, 177; *Cobb v. Stokes*, 8 East 358. *Right v. Darby*, 1 Term Rep. 162. *Messenger v. Armstrong*, 1 Id. 53. *Bedford v. M'Elherron*, 2 Serg. & Rawle 50*. *Boggs v. Black*, 1 Binn. 335. *Logan v. Herron*, 8 Serg. & Rawle 459. *Van Cortlandt v. Parkhurst*, 5 Johns. 128. *Adams on Ejectment*, 101-2.

Now the lease or agreement in the case under consideration is not expressly for any determinate period of time, and it is only by construction that a limitation can be affixed to it. It, at an early period in *England*, would have been considered a letting at will, but, as it is not so in express terms, it would at the time of our revolution have been

deemed a lease from year to year ; and more especially so, as an annual rent is reserved to be paid. 2 Bl. Com. 147, Chitty's ed. and note (11). Adams on Eject. 102-3. Sir William Blackstone says, speaking of tenancies at will, "Courts of late have rather held them to be tenancies from year to year, so long as both parties please, especially where an *annual rent* is reserved." 2 Bl. Com. 147. In *Bree v. Lees*, 2 Bl. Rep. 1173, Lord Chief-Justice De Grey, says, "All leases for uncertain terms are *prima facie* leases at will ; it is the reservation of an *annual rent* that turns them into leases from year to year." And Sir J. Mansfield, C. J., in *Richardson v. Langridge*, 4 Taunt. 131, lays down the same rule in a case put by him by way of illustrating it in the following words : "If there were a general letting at a *yearly* rent, though payable half yearly or quarterly, and though nothing were said about the duration of the time, it is an implied letting from year to year." Now this meets the description of the lease in question in every particular with the utmost precision, which is a general letting without anything being said as to the duration of the time, at a *yearly* rent of eight hundred dollars payable quarterly. It also comes directly within the description of a lease from year to year, as it is given by Messrs. Chambers, Bingham, and Comyns, who have each written and compiled a treatise on this subject. Mr. Chambers, in his work, page 355, says, that "a general taking at an *annual rent* is a lease from year to year." See Bing. Landlord and Tenant, 177, and Comyn's Landlord and Tenant, pp. 7, 8, 91, and 303, all to the same effect. Besides, it appears to me, that the intention of the parties to the lease in the present case, so far as it can be collected from the face of the writing itself, requires it to be construed a lease from year to year, and so on as long as both parties pleased ; otherwise some determinate point of time as its end or fixed period of duration, would have been expressly mentioned. But if it were even doubtful whether such was the intention of the parties, still upon the principle that every lease is to be taken most strongly against the lessor, and this construction being the most favorable for the lessees, it ought to prevail. There is also another view to be taken of this agreement, which still further satisfies me that this is the true construction to be put upon it, which is this : suppose the plaintiffs in error had continued to occupy the warehouse for the space of eighteen months or two years without having paid any rent, and without any dissent having been expressed to their so holding it, could they not have been distrained

on at common law, or have been sued for the rent for the whole of the time which had elapsed under this agreement as an entire contract, which had by its terms opened at the commencement of every succeeding year to embrace it, and had become binding upon the parties for that year, in the same manner as if the agreement had been for a fixed and definite period which included it? There is certainly no objection to an affirmative answer to this question to be found on the face of the agreement; and without giving to it this construction, great injustice might occasionally accrue to either party. I however do not wish to be understood as entertaining the opinion that a lease for a year, and so from year to year as long as both parties shall please, is a lease for the term of two years certain at its commencement. My idea of it is this: that it is binding prospectively on the parties for one year only, capable however of being extended to a second, third, fourth or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year, by giving three months previous notice to that effect, but at no time before the close of a year after it has once commenced.

Whether it be a lease in the first instance for one or two years certain, is a question upon which there has been some diversity of opinion.

Brooke, in his *Abr. tit. Tenant, per copy de court roll*, pl. 17, says, "By the best opinion it is a lease for years." This according to what is laid down in the *Bishop of Bath's Case*, 6 Co. 36, as necessary to constitute a lease for *years* would make it at least two years, as less would not satisfy the plural number. The case of *Agard v. King*, Cro. Eliz. 775, declares it to be a lease for two years certain. In the *Bishop of Bath's Case*, 6 Co. 36, it was resolved, after three years at most, to be a lease at will; which Rolle in his *Abr.* 851, seems to think means a lease for two years at least, but after three years at most, only an estate at will. In *Bellasyse and Burbridge*, 1 Lutw. 213, it was held to be a lease for two years; and in *Stanfill v. Hickes*, 1 Ld. Raym. 280. 2 Salk. 413, 3 Ib. 135, it seems to have been considered a lease for two years, and after that a lease only at will. And in a late case of *Denn v. Cartwright*, 4 East 31, it was pronounced to be a demise for two years at least. But as no authorities are vouched in the report of this case, it is probable that the decision was made without an examination of them.

On the other side in an anonymous case, 2 Salk. 413, it was held, if

A. demised lands to B. for a year and so from year to year, that it was not a lease for two years and afterwards at will, but it was a lease for every particular year, and after the year was begun, the defendant could not determine the lease before the year was ended. S. C. Holt's Rep. 414, ruled by Chief-Justice Holt, at the summer assizes at Lincoln, 1699. In *Leighton v. Theed*, 1 Ld. Raym. 707, Lord Chief-Justice Holt ruled, that if A. make a lease to B. for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, A. may determine his will at the end of *any year*, but if a new year be begun, it cannot be determined before the end of it. He also ruled the same point accordingly at a trial upon the summer assizes at Lincoln, 1699, between *Lely and Green*.

In *Dod v. Monger*, 6 Mod. 215, S. C. Holt 416, he said, "If a lease be for a year, and so from year to year as long as both parties shall please, it is a lease binding but for one year; but if the lessee without countermand of the lessor, enter upon the second year he is bound for that year, and so on. And so in *Fenwick v. Lady Grosvenor*, 12 Mod. 610, he ruled the same to be a lease for one year absolutely; and if the lessee continues on the *first day* of the *second year*, he is bound for that year also: and so is the lessor if he has not warned him away before the beginning of the second year."

I have adopted the opinion and decision of Chief-Justice Holt: first, because I believe it was the settled law of his time; next, because it comports best with the common and ordinary understanding and meaning of the terms employed in such leases; and lastly, because I consider it as agreeing best with the true grammatical construction of them.

Indeed I feel altogether at a loss to conceive how the assent of the parties is to be made out for more at any time than one year prospectively and absolutely. But that it amounts to a positive agreement for one year I think is clear; and further, if the holding should continue until a second year has commenced without the dissent of either party, it becomes a lease for two years certain, and cannot be determined by either party before the end of the second year; and the meaning of the words "from year to year," is, that the holding shall only cease at the end of the year and at no other time: and if the holding were to continue in like manner for three, four, five or six years, it would become, in respect to time past, and as a contract executed, a lease for just as many years as had elapsed: and at the end of six years, might be de-

clared on as having been a lease for that number of years, by either party. This was expressly ruled and settled in *Legg v. Strudwick*, 2 Salk. 414, and in *Birch v. Wright*, where it is placed in a very clear and satisfactory point of view, by Mr. Justice Buller, 1 Term Rep. 380.

Believing the lease in question then to be a lease from year to year, the plaintiffs in error, having continued to hold the demised property until after the second year had commenced, without offering to surrender the possession to the defendant in error, or having received from him any notice to quit, became tenants under the agreement, entitled to hold it for another year, in despite of the defendant in error; but at the same time bound upon the principle of reciprocity to pay the rent of three hundred dollars quarterly. The defendant in error could only have put an end to the lease, by giving a notice to the plaintiffs in error, at least three months before the end of the year, to surrender to him the possession, as soon as that time should come around. This principle is settled or recognized in *Bedford v. M'Elherron*, 2 Serg. & Rawle 50*. *Brown v. Vanhorn*, 1 Binn. 334, in note. *Fahnestock v. Faustenauer*, 5 Serg. & Rawle 174. *Thomas v. Wright*, 9 Serg. and Rawle 87. Indeed, wherever the lease is not for any precise, express and determinate period of time, notice seems to be requisite, as a reasonable and necessary protection against surprise, and the consequent loss or inconvenience that might result therefrom; and has, in modern times, been extended to a tenancy at will, on account of its uncertain duration. See *Parker v. Constable*, 3 Wils. 25.

We think that the judgment of the District Court was right, and it is therefore affirmed.

Judgment affirmed.

Tenancy from year to year is the result of judicial legislation prompted by the inconvenience arising from the extreme uncertainty of possession under an estate at will. As said by Lord KENYON, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences, and in order to obviate them the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice," *Doe ex d. Shore v. Porter*, 3 T. R. 13. This tenancy is found to be recognized in the books as early as the reign of Henry VIII. See Year Book, 13 Hen. 8, 15 b, and to such an extent has it superseded the ten-

ancy at will, that Best, Serg., in *Richardson v. Langridge*, 4 Taunt. 128, argued that there was no longer in England such an estate possible as a tenancy at will in the strict sense, but this was denied by CHAMBRE, J., who added: "The courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none;" and the Court (Sir JAMES MANSFIELD, C. J., HEATH and CHAMBRE, JJ.), sustaining the ruling of Lord ELLENBOROUGH at *nisi prius*, held the tenancy in the case before it to be at will.

Character of Estate from Year to Year.

While the tenancy from year to year undoubtedly grew out of the estate at will, yet when created it so far partakes of the character of an estate for years as to justify the remark of BATTLE, J., in *Kitchen v. Pridgen*, 3 Jones Law 49, "A tenancy from year to year is a species of term of years; from which, however, it is distinguished, inasmuch as the duration of the term is not limited," and we shall see that in many respects the tenancy from year to year resembles a term of years.

It has been contended that the implication of law which has created the estate from year to year, does not apply where the subject of the tenancy is a house, on the ground, in all probability, that the original intent of the courts in creating the estate was to protect the right of the tenant to crops planted by him on the land of another, which he occupied by permission for an indefinite time, and to encourage him to pursue agriculture properly; while this was probably the motive which led to the creation of the estate from year to year, yet the distinction contended for does not exist, and has been declared not to be founded on reason. See the remarks of BULLER, J., in *Right ex d. Flower v. Darby et al.*, 1 T. R. 159.

Creation of Estate from Year to Year.

Tenancy from year to year may be created by an express agreement, or it may be implied from the terms of an indefinite letting; thus where there was an agreement between the widow and the son of a decedent, that they should live together on land of the decedent as one family, and that the son should carry on the farm, it was held that the son was tenant from year to year, *Leavitt v. Leavitt*, 47 N. H. 329; and where one made a conveyance in trust for the grantor for life and after his death in trust for his daughter and her four children, share and share alike, and after the grantor's death the trustee requested the daughter to take possession of the land, agreeing that she and her children should "eat and

wear" each her and his fifth part of the proceeds of the property, reserving a right of general control to the trustee, and the daughter entered under the agreement, it was held that she became tenant from year to year of the shares of her children, *Hall v. Hall*, 6 G. & J. 386; and in *Thomas v. Wright*, 9 S. & R. 87, a contract that a person should occupy a house, repair it, and enjoy it until at a certain rent his outlay was reimbursed, was held a tenancy from year to year.

Tendency of Courts to Construe an Uncertain Tenancy as One from Year to Year.

The general tendency of the courts is to construe a doubtful or uncertain tenancy as one from year to year, *Williamson v. Paxton*, 18 Gratt. 475; *Hall v. Hall*, 6 G. & J. 386; and see the Revised Code of Delaware (1874), Ch. CL, § 15, pp. 630-1; and it has even been held in some States that all general tenancies are to be taken as from year to year, *Ridgely v. Stillwell*, 25 Mo. 570; *Sullivan v. Enders*, 3 Dana 66; *Squires v. Huff*, 3 A. K. Mar. 17; Rev. Stat. of Indiana, § 5208, p. 1128; *Browne's Adm'r v. Bragg*, 22 Ind. 122; *Ross v. Schneider*, 30 Id., 423; *Burbank v. Dyer*, 54 Id., 392; *Swan v. Clark*, 80 Id. 57; *Coomler v. Hefner*, 86 Ind. 108; but the presumption of a tenancy from year to year which arises from a general occupation is rebuttable, *Den ex d. Stedman v. M'Intosh*, 4 Ired. Law 291.

In New Hampshire, see Gen. Laws (1878), Ch. 250, § 5, p. 576; Iowa, see 1 M'Clain's Ann'd Stat. (1880), § 2014, p. 568, and Kansas, Comp. Laws (1879), § 2993, p. 520, by statute a general tenancy is presumptively at will, but the presumption is rebuttable, and the true state of the tenancy may be shown, *Currier v. Perley*, 24 N. H. 219.

Tenancy from Year to Year, where Tenant Enters and Pays Rent referable to a Year or a Portion thereof.

A generally received rule is that a tenancy from year to year arises where the tenant enters upon the land for an indefinite time at a rent fixed either by the year or by reference to an aliquot portion thereof, *Ex'rs of Godard v. South Carolina Railroad*, 2 Rich. 346; *Patton v. Azley*, 5 Jones Law 440; *Johnson v. Johnson*, 13 R. I. 467.

And this reservation, or payment, from which a reservation may be inferred, of such a rent is, in the absence of statutory enactment to the contrary, held essential to the creation of the estate, *Rich v. Bolton*, 46 Vt. 84; *Chamberlin v. Donahue*, 45 Id. 50; *Williams v. Deriar*, 31 Mo. 13; *Johnson v. Johnson*, 13 R. I. 467; *Dunne v. Trustees*, 39 Ill. 578;

Kitchen v. Pridgen, 3 Jones Law 49; and see *Herrell v. Sizeland*, 81 Ill. 457; and it is to be noted that in *Hall v. Hall*, 6 G. & J. 386, there was an annual rent reserved to the cestui que trusts, viz., that each should "eat and wear" his full fifth part of the proceeds of the land; and in *Thomas v. Wright*, 9 S. & R. 87, the agreement was for a certain "rent," which, the time for which it was to be paid not being specified, is to be taken as meaning an annual rent, 2 Blacks. Com. 41.

The mere fact that the annual rent is paid in monthly portions will not prevent the tenancy from being one from year to year, *Ridgely v. Stillwell*, 25 Mo. 570; *Scully v. Murray*, 34 Id. 420; *Rothschild v. Williamson*, 83 Ind. 387; but it is otherwise where there is a letting for a certain amount per month, without anything being said about a year; in that case the letting is from month to month only, *Hollis v. Burns*, 100 Pa. St. 206.

Conversion of Tenancy at Will to Tenancy from Year to Year.

A tenancy which in its inception is not from year to year but at will, may become converted into a tenancy from year to year by the dealings of the landlord and tenant. In some cases it has been held that this change may be worked by mere lapse of time and long continued possession of the lessee. It was so held in *Jackson ex d. Livingston v. Bryan*, 1 Johns. 322; *Hanchett v. Whitney*, 2 Aik. 240; but the first cited case is of but doubtful authority, for although technically it is the decision of the Supreme Court of New York at a time when it contained judges of singular learning and ability, yet it is in reality, as to the point before us, but the decision of but two judges out of five. In that case it appeared that the tenant had entered originally as tenant at will, and had held possession for some eighteen years without payment of rent. SPENCER, J., said: "It is true that the reservation of a yearly rent is one of the criteria by which to distinguish a tenancy from year to year; but in good sense the landlord's right to sue for use and occupation is equivalent to an express reservation of rent." KENT, C. J., concurred, but THOMPSON, J., dissented, and TOMPKINS, J., who concurred in the result of the case, considered the tenancy in question to be one at will, while LIVINGSTON, J., on account of his relationship to the plaintiff's lessor, took no part in the decision. The case of *Hanchett v. Whitney* is practically overruled by the later Vermont cases; see *Silsby v. Allen*, 43 Vt. 172; *Barlow v. Wainwright*, 22 Id. 88. The case of *Den ex d. M'Kay v. M'Kay*, Pen. 307, has been cited in support of the position stated above, but hardly goes far enough to sustain it. It was a *nisi prius* decision of PENNINGTON, J., who entered a non-suit in a case where the tenant had entered as tenant at will to his father, had held the premises

for six years prior to his father's death, had improved the property and remained in possession for nine years after his father's death, when his brother brought an ejectment without giving any notice. All the learned Judge held was that he should have had "notice." He did not say that he was a tenant from year to year, or that he should have such notice as such a tenant would be entitled to, and the "notice" spoken of would have been satisfied by a demand of possession and the allowance of a reasonable time within which to leave the premises, such as we find frequently allowed in cases of estate at will. The same ground was taken by the Court in *Doe ex d. Van Campen v. Depue*, 6 Hals. 410, in which case a tenant who had been in possession for twenty years was held entitled to notice. It is true that in *Den ex d. M'Eowen v. Drake*, 2 Gr. (N. J.) 523, HORNBLOWER, C. J., while admitting that nothing was said in the two foregoing cases about the length of notice, held, with the concurrence of FORD, J., that the notice should be taken to be a notice of six months; but even in this case the Court did not say that a tenancy at will could be turned into one from year to year by mere lapse of time, but, relying to a very great extent on the dissenting opinion of PUTNAM, J., in *Ellis v. Paige*, 2 Pick. 71, note, held that in all cases of an uncertain tenancy there should be half a year's notice to quit. The proposition then seems to us to be very weakly, if at all, supported by authority, and it also seems without any very solid foundation in reason, for a tenant having entered to hold at will of the lessor, that tenancy would presumably continue until changed by some appreciable act; the mere continuance of possession would argue of itself nothing more than the continuance of the lessor's will, and even the receipt of a money compensation, as for use and occupation, would argue nothing more than that the lessor had been paid for the enjoyment of his land by the tenant; but when an annual rent is paid, or a rent referred to any portion of a year as such a portion, we can then see that a very different condition of affairs is presented, and the correspondence between the division of the rent paid and the time of enjoyment of the property at once gives rise to the inference that a bargain has been made which has changed the character of the tenancy. We think, therefore, that those cases which hold that it is not the length of time during which the tenant holds possession, but the payment of a rent which can be referred to an actual or constructive new contract, that works the conversion of the tenancy, contain the better statement of the law.

Tenancy from Year to Year Arising from Holding Over.

A tenancy from year to year will presumptively arise where, without any stipulations, a tenant for years holds over, by the permission of his

landlord, after the expiration of his term, the landlord thereby electing not to consider him as a trespasser, *Sullivan v. Cary*, 17 Cal. 85; *Vrooman v. M'Kaig*, 4 Md. 450; *Tolle v. Orth*, 75 Ind. 298; *Adams Express Co. v. M'Donald*, 21 Kan. 680; Gen. Stat. Kansas, Ch. 55, § 2, p. 539; *Witte v. Witte*, 6 Mo. App. 488; *St. Louis and Iron Mountain Railroad Co. v. Ludwig*, 6 Id. 584; *Usher v. Moss*, 50 Miss. 208; *Conway v. Starkweather*, 1 Denio 113; *Moore v. Beasley*, 3 Ohio 294; *Witt v. Mayor of New York*, 6 Robt. 441; *M'Kay v. Mumford*, 10 Wend. 351; *Jackson ex d. Wood v. Salmon*, 4 Id. 327; *Park v. Castle*, 19 How. Pr. 29; *Philips v. Monges*, 4 Whart. 226; *Laquerenne v. Dougherty*, 35 Pa. St. 45; *Jackson v. Patterson*, 4 Harring. 534; *Den ex d. Decker v. Adams*, 7 Hals. 99; *Gardner v. Board of County Commissioners*, 21 Minn. 33; *Harkins v. Pope*, 10 Ala. 494; *Prickett v. Ritter*, 16 Ill. 96; *Allen v. Bartlett*, 20 W. Va. 46. The continued tenancy will remain subject to all the covenants and terms of the former lease, which can still be made applicable between the landlord and tenant, *De Young v. Buchanan*, 10 G. & J. 149; *Vrooman v. M'Kaig*, *supra*; *Bacon v. Brown*, 9 Conn. 334.

The election between considering the tenant holding over as a tenant from year to year, or as a trespasser, rests solely with the landlord, *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Ames v. Schuesler*, 14 Ala. 600; *Smith v. Allt*, 7 Daly 492; and the will or desire of the tenant, or his intention in holding over, will have no weight in determining the character of his possession; even if before the expiration of his term he notify his landlord that he will not stay, still, if he, nevertheless, hold over, he may be considered as a tenant from year to year, *Conway v. Starkweather*, 1 Denio 113; and the holding over, which will enable the landlord to exercise his election, need not be for any given length of time; any holding over will give rise to the landlord's right, for the tenant cannot claim that after the conclusion of his definite term he is entitled to a further reasonable time within which to remove his goods from the demised premises, *Witt v. Mayor, etc., of New York*, 6 Robt. 441.

While the election is exclusively with the landlord, if he wishes to hold the tenant as from year to year, such election must be manifested in order to have effect; a tenancy from year to year will not be inferred from the mere fact that the landlord does not take prompt steps to recover possession of the premises held by the tenant, *Cairo and St. Louis Railroad Co. v. Wiggins Ferry Co.*, 82 Ill. 230. A common way of recognizing a tenancy is by receiving rent, *Hall v. Myers*, 43 Md. 446; *Allen v. Bartlett*, 20 W. Va. 46; or by distraining therefor, *Conway v. Starkweather*, 1 Denio 113.

In some cases the inaction for a considerable length of time, or even the

mere silence, of the landlord, may manifest an election to recognize a tenancy, *Conway v. Starkweather*, *supra*; *Moshier v. Reding*, 12 Me. 478.

The presumption of a tenancy from year to year which arises from holding over may be rebutted by circumstances. Thus, in *Williamson v. Paxton*, 18 Gratt. 475, W. entered upon certain land under a contract of sale, by the terms of which he was to pay a certain sum in cash and do a certain act; if he failed to perform the said act by a certain day, the contract provided that he might occupy the premises for one year, and that the money paid by him should be taken as the rent for that time. The vendee failed to perform the act, but remained in possession of the premises beyond the year provided for in the contract. It was held that his holding over the year did not make him a tenant from year to year, although he paid rent for the second year of his occupancy, the Court saying: "It was never intended that the relation of landlord and tenant should exist between the plaintiff and defendant except as a mere incident of the contract of conditional sale."

In *Smith v. Allt*, 7 Daly 492, it was held that where a tenant, pending negotiations with his landlord for a new lease, held over with the landlord's consent, he could not be held as a tenant from year to year. In *Wilcox v. Raddin*, 7 Bradw. 594, where the tenant had taken a lease of another house from the same landlord, and on the expiration of his term the new house was not ready for occupancy, and, having surrendered his old lease, the tenant remained in the old house, but quitted it on being notified that he was regarded as occupying for an additional year, the Court decided that he could not be held as tenant from year to year; and in *Crommelin v. Thiess & Co.*, 31 Ala. 412, the fact that the parties had made a void parol agreement for another tenancy of the property was held sufficient to prevent the holding over from establishing a tenancy from year to year.

In *Hoffman v. McCollum*, 93 Ind. 326, the term granted by a lease having expired, the tenant was allowed to remain in possession of the premises, paying a certain rent, until he "could find another place." This assent of the landlord was held not to create a tenancy from year to year.

In some cases the terms of the lease under which the tenant enters will determine the question whether a holding over is to constitute a tenancy from year to year or not; thus, where the lease is for a time certain, and gives to the lessee the privilege of retaining possession for a further certain time, the holding over after the expiration of the first-named period will be regarded as an election by the tenant to avail himself of his privilege and to take the further granted time, *Montgomery v. Board of Commissioners of Hamilton County*, 76 Ind. 362; *Delashman v. Berry*, 20 Mich. 292; but where the lease provides for a renewal, or for the execution of a

new lease, the holding over will create a tenancy from year to year, *Huger v. Dibble*, 8 Rich. 222; *Thiebaud v. First National Bank of Vevey*, 42 Ind. 212; *Renoud v. Daskam*, 34 Conn. 512.

Where the term, after the expiration of which the tenant holds over, is one for a period short of a year, and for a period from a lease for which it may be implied that the parties contemplated only a short tenancy, as a lease for a month, or from month to month, the holding over will not give rise to a tenancy from year to year, but only for such period as is equivalent to the originally granted term, *Hollis v. Burns*, 13 W. N. C. 241; S. C. 100 Pa. St. 206; *Blumenberg v. Myers*, 32 Cal. 93.

A tenancy from year to year does not arise from a holding over in Massachusetts, Maine, or Michigan, in which States the tenant holding over is regarded as tenant at will, see page 127.

The holding over which will render the lessee the tenant from year to year may be by a subtenant, but where the State or Federal government enters upon demised premises for public purposes, pays rent to the lessee, and remains in possession after the expiration of his term, no tenancy from year to year arises, *Constant v. Abell*, 36 Mo. 174.

Tenancy from Year to Year Arising through Operation of Statute of Frauds.

A tenancy from year to year may arise through the operation of the Statute of Frauds, as follows: where a parol lease of lands is made which is void for excessive length under the provisions of the Statute, and the lessee enters upon and holds the demised premises and pays or undertakes to pay rent therefor, he will be regarded as a tenant from year to year, *Schwuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 Id. 226; *Taggard v. Roosevelt*, 2 E. D. Sm. 100, S. C. 8 How. Pr. 141; *Craske v. Christian Union Publishing Co.*, 24 N. Y. S. C. 319; *Reeder v. Sayre*, 13 Id. 562; *Dorr v. Barney*, 12 Id. 259; *Lounsbery v. Snyder*, 31 N. Y. 514; *Scully v. Murray*, 34 Mo. 420; *Kerr v. Clark*, 19 Id. 132; *Ridgley v. Stillwell*, 28 Id. 400; *Clemens v. Broomfield*, 19 Id. 121; *Koplitz v. Gustavus*, 48 Wisc. 48; and the terms of the parol letting will regulate the tenancy except as to its duration, *People v. Rickert*, *Koplitz v. Gustavus*, *supra*. In some cases it is held that there must be the payment or reservation of an annual rent before the tenancy originating under a void lease can be held to be from year to year, *Barlow v. Wainwright*, 22 Vt. 88; *Coan v. Mole*, 39 Mich. 454; *Morrill v. Mackman*, 24 Id. 279; *Williams v. Ackerman*, 8 Oreg. 405; *Garrett v. Clark*, 5 Id. 464; *Lockwood v. Lockwood*, 22 Conn. 425, and this requirement seems well grounded in reason and in the nature of the tenancy, for

there can be no reason why an entry under a void lease should give rise to a tenancy from year to year, through an implication founded upon the payment of, or promise to pay, rent, unless the same be referable to a year or to an aliquot portion thereof, as in the case where such tenancy is implied after a general entry and payment of rent.

It has been held in some cases that the tenancy so originating must continue for upwards of a year before it becomes from year to year, *Strong v. Crosby*, 21 Conn. 398; *M'Dowell v. Simpson*, 3 Watts 129.

The estate from year to year has been held to arise from a void lease, even in those States where the Statute of Frauds declares that a lease for a time greater than that allowed in it shall be held to be an estate at will, viz., Missouri, 1 Rev. Stat. (1879), § 2509, p. 420, *Ridgeley v. Stillwell*, *Kerr v. Clark*, *supra*; New Jersey, Rev. of 1877, p. 444, § 4, *Drake v. Newton*, 3 Zab. 111; Ohio, Rev. Stat. (1880), § 4198, p. 1052; Pennsylvania, Pur. Dig., p. 723, pl. 1; South Carolina, Gen. Stat. (1882), § 2017, p. 587; and the reason for such holding is that the estate at will having been in existence at the time of the enactment of the Statute of Frauds, when that statute declared that a void parol lease should operate to create an estate at will only, it meant an estate at will possessing all the qualities attached to such an estate by the law, one of which was convertibility, by entry and payment of rent, into an estate from year to year, *Williams v. Deriar*, 31 Mo. 13; *Barlow v. Wainwright*, 22 Vt. 88.

This, however, is not the rule in Massachusetts; in that State the statute of 1793, which was the same in effect as Pub. Stat. (1882), Ch. 120, § 3, p. 732, declared that estates not created by writing should be held at will only; in *Ellis v. Paige*, 1 Pick. 43, it was argued that as in England estates so arising were held to be estates from year to year, they should be so held in Massachusetts; but this was denied by the Court, WILDE, J., saying: "There is an exception in the English statute in favor of parol leases not exceeding the term of three years, which was adopted here in the provincial statute of 4 William and Mary. The omission of it in the statute now in force shows plainly the intent of the legislature to place all parol leases on the same footing. . . . We are not at liberty to suppose that the provision or exception in the provincial statute was omitted by mistake, and if not, then clearly it was the intention of the legislature to place all parol demises on the same footing; for such is the obvious import of the Statute of Frauds.

"That the doctrine as to tenancies from year to year depends upon the exception in the English statute appears to be very clear, although but little is to be found in the books on this point. In the case of *Legg v. Strudwick*, 2 Salk. 414, it was decided that a parol demise *habendum de*

anno in annum et sic ultra quamdiu amabus partibus placeret was a lease for two years and from year to year after; so that if the tenant holds on after two years he is not tenant at will but for a year certain, the Court say that his holding on after the two years must be taken to be an agreement in the original contract and in extension of it. And such an executory contract, they say, is not void by the Statute of Frauds, though it be for more than three years, because there is no term for above two years ever subsisting at the same time. The plain inference is that but for the exception in the statute the lease in that case would have been held a lease at will only. The doctrine as to tenancy from year to year was introduced long before the Statute of Frauds. In the case of *Doe v. Porter*, 3 D. & E. 16, Lord KENYON says: 'The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences; and in order to obviate them the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice.' At first a lease without limit of time and with the reservation of an annual rent was considered as a lease for a year certain. This was better than the old tenancy at will, but still inconvenient, because the tenant might be compelled to quit at the end of the year without notice, *Timmins v. Rowlinson*, 1 W. Bl. 533, S. C. 3 Burr. 1609. Then followed tenancies from year to year, which were found most convenient, as the estate could not be suddenly determined nor without six months' notice to quit. Thus stood the law at the time the English Statute of Frauds was penned, and the exception was introduced, no doubt, for the purpose of supporting short parol leases and tenancies from year to year depending on implied contracts. But whether this be so or not, it is very clear that the English doctrine respecting tenancies from year to year can only be supported by the exception in the statute, and that by our statute there can be no tenancy from year to year unless by a lease in writing."

The Massachusetts doctrine is followed in Maine, where the statute, Rev. Stat. (1871), Ch. 73, § 10, p. 560, is substantially the same as that of the former State, *Davis v. Thompson*, 13 Me. 214; but the reasoning upon which it is based has been criticised, and it seems justly, in Vermont, where a statute similar in phraseology has been held not to work the same effect, see *Barlow v. Wainwright*, 22 Vt. 88, in which case, BENNETT, J., in delivering the opinion of the Court, said: "We think the words of the statute are satisfied by holding that in the first instance the estate created in the present case was an estate at will, and only an estate at will, yet that it should inure, like other estates at will, and have the incidents common to an estate at will, one of which is *convertibility* into a holding from year to year by the

payment of rent. To go further, and hold that the estate created under the statute as an estate at will must ever remain such would be to go beyond the statute, and evidently contravene its provisions rather than obey them. I am aware that in Massachusetts, in the case of *Ellis v. Paige et al.*, 1 Pick. 43, and in *Hollis v. Pool*, 3 Met. 354, it was held that, under their statute of 1793, a person entering under a parol lease for any certain time shall not, even after occupation and payment of rent, be treated as a tenant from year to year, but shall at all times be regarded as a tenant at will. The statute of Massachusetts is very similar in its phraseology to our statute of 1797. It enacts that parol leases shall have the effect of leases on estates *at will only*, and shall not at law or equity be deemed or taken to have any other or greater force and effect. Though the statute of that State, as well as the statute of this State, is decisive against the creation of a tenancy from year to year in the first instance, yet I do not see how the reasoning of the Court in these cases applies against the growth of an estate at will created under the statute into a tenancy from year to year. It is true the English Statute of Frauds has an exception as to leases not exceeding the term of three years, and this is dwelt upon by the Court of Massachusetts as a reason why the decisions of the courts of England under their statute should not furnish a rule for them. I must confess that I do not see the force of the reasoning of the Court which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English statute."

Corporation as Tenant from Year to Year.

In England it has been held that a corporation cannot become a tenant from year to year by implication. The question has been raised in this country, and the contrary conclusion arrived at in *Crawford v. Longstreet*, 43 N. J. Law 325, in which case the matter was very ably discussed and the reasons of decision very clearly given by KNAPP, J., as follows: "To turn to the other proposition, that an incorporated company is denied the legal power to hold upon an implied contract as tenant from year to year. It is quite clear, I think, that there exists no such legal impediment. No American case is referred to, nor is any found asserting such a rule. The cases cited in its support are from the English courts. That of *Finlay v. Bristol Railway Co.*, 7 Exch. 409, stands prominent amongst these upon the point, and so decided. To the same effect are several cases referred to in the opinion delivered by the Court in that just mentioned. But this result is expressly based upon their theory of the law that corporations can contract only by their common seal, and when such tenancy rests upon an

implied contract arising out of the circumstances of occupation and payment of rent, only those who can bind themselves by such contracts can hold by that tenure; corporations say they cannot contract by parol.

“Under our view of the law, as already shown, private corporations are with us under no such restriction, having within the range of their chartered powers the same ability to contract that pertains to natural persons. The reason of the rule in the English courts has therefore no application. It would, I think, be difficult to suggest any other rational ground for a rule that a corporation, having power to hold lands for a term of years, should be debarred from the advantages or absolved from the liabilities that arise from such a tenancy. It certainly would not be held here that a corporation in the occupancy of premises under circumstances that would create a tenancy from year to year in a private individual could abandon the premises after a new year had been entered upon without being liable for the whole year's rent, or could terminate such tenancy at the end of the year without giving the prescribed notice to the landlord.”

Notice to Quit—When to be Given.

The main difference between a tenancy from year to year and one at will is that in the former the tenant is entitled to notice to quit, *Sullivan v. Cary*, 17 Cal. 85; *Vincent v. Corbin*, 85 N. C. 108, and in the latter he is not. See *ante*, p. 175. The notice required at common law was six months before the termination of the year of tenancy, *Sullivan v. Enders*, 3 Dana 66; *Ridgley v. Stillwell*, 25 Mo. 570; *Floyd v. Floyd*, 4 Rich. 23; *Hunt v. Morton*, 18 Ill. 75; *Den ex d. M'Eowen v. Drake*, 2 Green (N. J.) 523; *Semmes v. United States*, 14 Ct. of Cl. 493; *Reeder v. Sayre*, 70 N. Y. 180; and such is still the length of notice required in New Jersey, *Den ex d. Hankinson v. Blair*, 3 Green (N. J.) 181; *Den ex d. M'Eowen v. Drake*, *supra*; Kentucky, *Squires v. Huff*, 3 A. K. Mar. 17; *Sullivan v. Enders*, *supra*; Maryland, *Hall v. Myers*, 43 Md. 446; Rev. Code (1878), p. 820; New York, 4 Kent Com. 113; *Bradley v. Covel*, 4 Cow. 350; North Carolina, *Den ex d. Stedman v. M'Intosh*, 4 Ired. Law 291; Tennessee, *Trousdale v. Darnell*, 6 Yerg. 431; Vermont, *Barlow v. Wainwright*, 22 Vt. 88; *Hanchet v. Whitney*, 1 Id. 311; Wisconsin, *Brown v. Kayser* (Supreme Court Wisconsin, Feb., 1884), 13 Am. Law. Rec. 19, S. C. 18 Reporter 123; New Hampshire, *Currier v. Perley*, 24 N. H. 224; and in Virginia (except as to lands or tenements within a town, where the notice required is three months), Code (1873), Ch. CXXXIV., § 5, p. 969. In other States, however, the time of notice has been changed: thus the time of notice is three months in Colorado, Gen. Laws (1877), § 1246, p. 474;

Indiana, Rev. Stat. (1881), § 5209, p. 1128; Kansas, Comp. Laws (1879), § 2997, p. 520 [if the land demised is farming land, the notice must be given and the term of holding be taken so that the year will expire on March 1st, § 2898]; Missouri, Rev. Stat. (1879), § 3077, p. 514; New Hampshire, *Currier v. Perley*, 24 N. H. 219; Pennsylvania, Pur. Dig., p. 879, pl. 17; *Brown v. Van Horn*, 1 Binn. 334, note; Rhode Island, Pub. Stat. (1882), Ch. 232, § 2; South Carolina, *Ex'rs of Godard v. South Carolina Railroad Company*, 2 Rich. 346; West Virginia, Rev. Stat. (1879), Ch. 113, § 5, p. 732; in Mississippi, Rev. Code (1880), § 1330, p. 381, it is two months; in Illinois, sixty days, Rev. Stat. (Hurd, 1880), Ch. 80, § 5, p. 673.

The notice to be of any effect must be given at the prescribed time before the termination of the year of the tenancy, at which time only it can be terminated by notice, *Brown v. Van Horn*, 1 Binn. 334, note; *Lloyd v. Cozens*, 2 Ashm. 131; *Williams v. Deriar*, 31 Mo. 18; *Witte v. Witte*, 6 Mo. App. 488; *Fahnestock v. Faustenauer*, 5 S. & R. 174; *Hanchet v. Whitney*, 1 Vt. 311. And in Illinois there is the further requirement that the notice must be within the four months preceding the last sixty days of the tenancy. See statute cited *supra*.

How to be Given.

At the old common law the notice might have been verbal, *Doe ex d. Lord Macartney v. Crick*, 5 Esp. 196, and such is still the law in some of the United States, *Koenig v. Bauer*, 1 Brewst. 304; *Wilgus v. Whitehead*, 6 W. N. C. 537; *Vincent v. Corbin*, 85 N. C. 108; and it is also held that where a mistake has been made in a written notice, it may be corrected by parole at the time of service, *Thamm v. Hamberg*, 2 Brews. 528, S. C. 7 Phila. 266; but in most of the States it is believed that the notification must be in writing. In some it is so provided by statute; see Oregon, Miscell. Laws, Ch. 17, Tit. III., § 34, p. 588; Rhode Island, Pub. Stat. (1882), Ch. 232, §§ 1, 3; and it is thought that wherever the notice is required to be given by statute, and the statute is silent as to the manner of giving notice, then the common law rule that where a notice is required to be given by statute it should be in writing, should prevail; in Pennsylvania, however, the common law rule prevails, although a notice of different length than that required by the common law is prescribed by statute, *Koenig v. Bauer*, *Wilgus v. Whitehead*, *supra*.

To Whom to be Given.

The notice should be given to the tenant or his assignee and not to an under tenant, *Doe v. Williams*, 6 Barn. & Cres. 41; *Pleasant d. Hayton v. Benson*, 14 East 234; who is bound by a service of notice upon the princi-

pal tenant, *Schilling v. Holmes*, 23 Cal. 227; and notice to persons in possession as tenants in common or joint tenants, addressed to all of them, is a good notice, although it only reach one, *Doe d. Lord Macartney v. Crick*, 5 Esp. 196; *Doe d. Bradford v. Watkins*, 7 East 531.

Notice must be Positive and Explicit. Effect of Notice in Alternative.

The notice must be explicit and positive; if in the alternative as to leave or pay an increased rent, it is invalid, *O'Neill v. Cahill*, 2 Brewst. 357, and see *Doe v. Jackson*, Doug. 175; but it seems that where a tenant holds over after such a notice a contract to pay the increased rent will be implied, *Pittfield v. Ewing*, 6 Phila. 455. The notice should point to the time of the termination of the year of the tenancy, and it has been held that a mere notice to quit at the end of the year is insufficient, *Hanchet v. Whitney*, 1 Vt. 311; and the premises should be intelligibly referred to; but a mistake in either of these particulars, if not actually misleading, will not destroy the effect of the notice. Thus in *Doe v. Knightley*, 7 T. R. 63, notice was given about Michaelmas, 1795, to quit at Lady Day, 1795, and was held to be a good notice to quit on Lady Day, 1796; and in *Doe v. Culliford*, 4 D. & R. 248, a notice served September 27th to quit on Lady Day next, "or at the end of the current year," was held to apply to the Lady Day next and not to the year ending at Michaelmas, and so not to be misleading. In *Doe ex d. Cox and Others*, 4 Esp. 185, a notice was given "to remove from the premises which you hold of me, situated in the parish of St. Anne, called the Waterman's Arms." In point of fact there was no *Waterman's Arms* in the parish, but there was a *Bricklayer's Arms*, which was held by the defendant of the plaintiff, and was the only premises so held by him, it was held that the tenant was not misled, and that the notice was a good one to quit the *Bricklayer's Arms*. In *Doe d. Armstrong v. Wilkinson*, 12 A. & E. 743, a notice was given to quit "all that messuage, etc., at Dunnington, in the county of York, which you now hold under me as tenant from year to year." The messuage claimed was in Heslington, a parish which adjoined Dunnington; it was held by COLTMAN, J., at *nisi prius*, and affirmed by the court in banc (LORD DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, JJ.), that as there was no evidence that the tenant held more than one property of the plaintiff he was not misled, and that the notice was a sufficient one to quit the premises in Heslington.

Waiver of Effect of Notice.

The effect of his notice may be waived by the landlord, as where, after a notice and a holding over, he distrains for subsequently accruing rent,

Zouch v. Willingale, 1 H. Bl. 311; *Prindle v. Anderson*, 19 Wend. 391; but the mere receipt of such rent or demand therefor will not necessarily be a waiver of the advantage of notice, *Goodright v. Cordment*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243; *Blyth v. Denmet*, 13 C. B. 178; and if the tenant replevy distrained goods, that will prevent the action of the landlord in distraining from reëstablishing the tenancy, *Blyth v. Denmet, supra*. Mere delay in ejecting a tenant after notice has expired does not constitute a waiver, *Boggs v. Black*, 1 Binn. 333; *Babcock v. Albee*, 13 Metc. 273.

A second notice to quit, after the expiration of the former one, is a waiver of the first, *Doe, Lessee of Brierly v. Palmer*, 16 East 53; but not if it is evident that it is not intended as a recognition of an existing tenancy, as where it is given after an ejectment has been commenced, *Doe v. Humphreys*, 2 East 237.

Forfeiture of Right to Notice.

If a tenant disclaim his tenancy he forfeits his right to notice, *Den ex d. Hankinson v. Blair*, 3 Green (N. J.) 181; *Head v. Head*, 7 Jones Law, 620; *Vincent v. Corbin*, 85 N. C. 108.

Right to Notice Mutual.

The right to receive and the obligation to give notice are mutual, and therefore not only must the landlord who desires to regain possession of the premises give notice to his tenant, but the latter when he desires to quit must give a like notice to the landlord; or he cannot get rid of the responsibilities of tenancy, *Morehead v. Watkyns*, 5 B. Mon. 228; *Lockwood v. Lockwood*, 22 Conn. 425; *Hall v. Wadsworth*, 28 Vt. 410.

It has been recently held in Pennsylvania that there the obligation to give notice is not reciprocal, and that a tenant from year to year may quit without notice. There is as yet no direct decision of the court of last resort upon the subject, but the question came before the Court of Common Pleas, No. 4, of Philadelphia, in 1884, in *Brown v. Brightly*, 14 W. N. C. 497. In that case there had been a written lease for one year from November 1, 1879, and from year to year thereafter, "unless either party shall give legal notice in writing to the other party of his intention to terminate said letting." The tenant held over after the expiration of the term until October 31, 1882, when, without giving any notice of intention to quit, he left the demised premises. The landlord brought an action to recover rent from November 1, 1882, to October 31, 1883. The Court held that the defendant as tenant from year to year was not bound to give notice of in-

tention to quit, resting its decision upon the case of *Cook v. Neilson*, 10 Pa. St. 41, and remarking, in the course of its opinion, which was delivered by ARNOLD, J., that "that judgment relieves us from all uncertainty as to the law and the origin of it." *Cook v. Neilson* was the case of a tenancy by the quarter, and the District Court held that the tenant was not bound to give notice before leaving. SHARSWOOD, P. J., filed a dissenting opinion, reported in Brightly's Reports 463, in which he made a learned review of the authorities, and held that the obligation to give notice was reciprocal. On the case being taken to the Supreme Court on a writ of error, the decision of the court below was affirmed by a divided court, no opinion being delivered, but the argument of the defendants in error was that the letting constituted tenancy at will determinable at the end of each quarter. Mr. Brightly, in his report of the case, says, "The question, therefore, cannot be considered as definitely settled in this State; the Supreme Court being divided, and the learned President of the District Court having dissented from the opinion of the majority of the judges." And this, we take it, notwithstanding the positiveness of the Court of Common Pleas, No. 4, in its assertion that *Cook v. Neilson* relieved it from all uncertainty, is a very general feeling in the profession in Pennsylvania. *Cook v. Neilson* does not seem to have been cited as authority from the time of its decision, in 1848, until cited in *Brown v. Brightly*. HARE, J., alluded to it in *Goldsmith v. Smith*, 4 Phila. 31; but that case was not decided upon a question of the character of the notice given, and the learned Judge, speaking of the decision in *Cook v. Neilson*, said: "It is difficult to believe that the Court meant to say that a tenant from year to year can put an end to the term by simply ceasing to use the premises before or at the end of any one year, without giving notice to his landlord, who may reside at a distance, or in any way signifying whether it is or is not his intention to return and reoccupy them subsequently." In *Wilgus v. Whitehead*, 89 Pa. St. 131, TRUNKEY, J., in delivering the opinion, spoke of the decision in *Cook v. Neilson* as the decision of the District Court, and regarded the question of the obligation of the tenant to give notice as still open. The case was as follows: A lease was made, dated May 6, 1866, for one year and thereafter, from year to year, "until legal notice is given for a removal;" the rent was payable monthly in advance. In March, 1873, it was agreed by parol that the rent should be paid for the future at the end of the month. On April 10, 1874, the landlord distrained for rent for the month ending May 6, 1874. The tenant brought replevin. On the trial in the Court of Common Pleas, No. 2, of Philadelphia, MITCHELL, J., charged "that the alleged parol agreement in the month of March, between the defendant and the wife of the plaintiff, she acting in behalf of her hus-

band, by which the payment of the rent in advance was changed and made payable at the end of the month during which the same accrued, was not sufficient to alter the terms of a sealed lease, as there was no consideration for it, the tenant being already bound by his lease for another year upon the terms of the lease." This instruction was affirmed by the Court in banc. The Supreme Court did not reverse upon the ground of error in the instruction so far as it spoke of the tenant being already bound for another year, but passed over that part of the case, saying, "That the tenant in March, 1873, was bound for another year, commencing in the following May, is a proposition not wholly free from doubt," and decided the case upon another ground by upholding the effect of the parol contract as a waiver by the landlord of strict performance of the terms of the lease. *Milling v. Becker*, 96 Pa. St. 182, and *Hollis v. Burns*, 100 Id. 206, both of which are cited in the opinion in *Brown v. Brightly*, recognize the right of a tenant from month to month to quit at the end of a month without giving notice. Now it is respectfully submitted that when the learned Judge in the last mentioned case says, "The reason which exempts a tenant by the quarter or the month from the obligation to give notice of his intention to quit seems to be stronger in the case of a lease for a year than it is in a lease for a quarter or a month," he goes too far. Of course, we shall take his expression, "lease for a year," as meaning a lease from year to year, since all admit that in the case of a lease for any definite time no notice is, generally speaking, necessary to be given by either lessor or lessee. And taking the words in this sense, it seems to us that, at least in the leasing of certain kinds of land, the damage and harm done by the sudden and unannounced quitting by the tenant would be much greater in the case of the longer term than in that of the shorter. Suppose that a lease from year to year of agricultural lands is made, and so made that each year for which it runs expires about the time, or shortly after the time, at which farmers, governed by the laws of good husbandry and farming, generally make their leases for the ensuing year; and then suppose that the tenant, without notice, suddenly quits at the end of the year. He not only deprives the landlord of a tenant, but in all probability of the chance of getting a tenant for that year; while, on the other hand, the utmost injury that can be inflicted on the landlord, where the tenant from month to month quits without notice, is the loss of a month's rent; for, if notice were required, it would be always in the power of the tenant to legally terminate the tenancy by giving one month's notice of intention to quit. We have, then, no positive authority for the position that a tenant from year to year is not required to give notice of intention to quit except *Brown v. Brightly*, with such support as it derives from the decision of the divided court in *Cook v. Neilson*. On

the other hand, apart from the natural feeling in favor of reciprocity, we have an excellent reason for requiring such notice, in the general custom of tenants in the country to quit farms at a particular season of the year. If such notice be not required, we have the consequence stated by Judge SHARSWOOD, "the landlord whose farm is deserted by the tenant on the first of April without notice, is left without a tenant, and his property is unoccupied and unproductive until the regular time of letting again comes round." This, as is remarked by the learned Judge, is "a public as well as a private loss against which it is the policy of the law to provide." And while we have no positive binding authority of the Supreme Court to the effect that a tenant from year to year must give notice of intention to quit, we have, besides Judge SHARSWOOD's opinion, and that of the Common Pleas in *Wilgus v. Whitehead*, *supra*, the dicta of several eminent judges of the Supreme Court. DUNCAN, J., in *Logan v. Herron*, 8 S. & R. 459, speaking of the provision for notice, said: "It promotes agriculture by giving security to the landlord and to the tenant; it prevents a surly landlord from dispossessing his tenant at an unseasonable time of the year, and a perverse and crooked tenant from quitting when the landlord cannot procure another tenant." GIBSON, J., in the same case, said: "In fact, the rule *must* be reciprocal; and if the landlord is bound for the succeeding year, so must the tenant be, where neither has given notice." It is true, as remarked by ARNOLD, J., that the above remark was applied to the question of the necessity of giving notice to bring to an end a definite term; but the reason that if one party to the tenancy is bound the other must be, is equally applicable to the question of notice to terminate a tenancy from year to year. In *Lesley v. Randolph*, 4 Rawle 127, KENNEDY, J., said: "My idea of a lease from year to year is this, that it is binding prospectively on the parties for one year only, capable, however, of being extended to a second, third, fourth or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months' previous notice to that effect."

In view, then, of the condition of the authorities and of the dicta cited above, we may be pardoned for differing from the opinion of the Court of Common Pleas, No. 4, and considering the question, assumed by it to be settled, as still open. On principles of justice and public policy there can be no reason why one party to a contract should be placed at a manifest disadvantage as compared with the other. It does not seem consonant to justice that the landlord should be kept in the dark as to what his tenant's intentions are until the very last minute, that the former should be bound to permit the tenant to remain for another year some three months before the tenant is compellable to make his election either to go

or to stay, and that the former should be rendered for that time unable to deal with the prospective possession of his property, and perhaps lose good opportunities of renting it, while the latter may coolly hold his landlord in suspense, and then throw the premises upon his hands on the very last day of the year.

Qualities of Term from Year to Year.

A lease from year to year is not determinable by the death of lessor or lessee; see Taylor, Landlord and Tenant, § 57, and cases cited; and in the absence of a contract to the contrary is assignable and demisable, *Pleasants v. Benson*, 14 East 234; *Cody v. Quarterman*, 12 Ga. 386; *Austin v. Thomson*, 45 N. H. 113; *Elliott v. Johnson*, L. R., 2 Q. B. 120; and indeed may be said, during the time it lasts, to partake of the qualities of, and impose the liabilities arising from, an estate for years in almost every respect.

Liability of Tenant from Year to Year for Waste.

Whether the resemblance of the estate from year to year is sufficiently close to that of the estate for years, to render the tenant liable for waste in cases where the tenant for years would be, is a question of some doubt.

Tenant from year to year is undoubtedly liable for commissive waste, as is every tenant whatever his interest, Addison, Torts, § 319; whether he is liable for permissive waste is a question about which there is more doubt. On the one side, it may be urged that as the tenancy from year to year is a mere development of the tenancy at will, and as the latter tenancy did not involve a liability for permissive waste, so neither should the tenancy from year to year; on the other hand, it may be urged that, notwithstanding its derivation, the tenancy from year to year resembles in its character and incidents rather an estate for years than one at will, and therefore the tenant should be held to the same rule as to waste as a tenant for years. The text-writers, as a rule, incline to the former position. Woodfall says, "Tenants from year to year are not considered tenants for years, but only as tenants at will (subject and entitled to the usual or agreed notice to quit), consequently, they are not liable for permissive waste," Woodf., L. & T., § 427. Addison lays down the rule that a tenant from year to year is not responsible for permissive waste, quoting Sir JAMES MANSFIELD's expressions in *Gibson v. Wells*, 1 Bos. & Pul., N. R. 290; Add., Torts., § 326. Mr. Taylor says that tenant from year to year was formerly so responsible, citing *Thursby v. Plant*, 1 Wms. Saund. 233 b, note 7, but is of opinion that the later authorities absolve him from such liability, Tayl., L. & Ten.,

§ 689. This opinion of the text writers is rested upon the cases of *Herne v. Bembow*, 4 Taunt. 764; *Gibson v. Wells*, 1 Bos. & Pul., N. R. 290; *Martin v. Gilham*, 7 Add. & Ell. 540; *Torriano v. Young*, 6 C. & P. 8, and in Woodfall the cases of *Leach v. Thomas*, 7 C. & P. 327, and *Horsefall v. Mather*, 1 Holt 7, are also cited; both of the last named cases were *nisi prius* decisions, in the first of which the real question was as to the right of the tenant to remove certain fixtures, in the other case the tenant was clearly at will. *Torriano v. Young* was also a *nisi prius* decision, and has been criticised, as have *Gibson v. Wells* and *Herne v. Bembow*, as involving the result that a tenant for life is also punishable for waste. See remarks of PARKE, B., in *Harnett v. Mailland*, 16 M. & W. 256, and of DEPUE, J., in *Moore v. Townshend*, 33 N. J. Law 284. It may be further remarked that in the report of *Herne v. Bembow* it does not appear what the holding was; that *Gibson v. Wells* was a case of a strict tenancy at will, and that the case of *Martin v. Gilham* was decided on a question of variance between the pleadings and the evidence, the declaration, in the opinion of the Court, charging commissive waste only, and the evidence showing permissive waste only.

The only American authority on the question immediately before us that we have been able to find is the recent case of *Brown v. Newbold*, 44 N. J. Law 266; in that case the question came squarely before the Court for its decision, and REED, J., delivered a very learned and able opinion. After pointing out the peculiarities of *Herne v. Bembow*, *Gibson v. Wells*, and *Martin v. Gilham*, and speaking of the criticism and disregard of *Torriano v. Young* in *Moore v. Townshend*, the learned Judge said: "In no case in which this question has been discussed, in the argument of counsel or in the opinion of courts, has it been suggested that one rule applies to tenants for years and another to tenants from year to year. The earlier comments on the statutes of Marlborough and Gloucester included within their operation both classes of tenants, 1 Saund. 323 b, note 7. Conceding that these acts cover tenancies for years, it seems too obvious for argument that they include the tenant in the case holding from year to year.

"It is true that many such estates had their origin in tenancies at will, and the tenant at will was not called upon to repair, because he had no certain enjoyment. The moment, however, the tenancy at will becomes a tenancy from year to year, the tenant acquires a right to a fixed period of occupation. It is a term which may be assigned, *Pleasant v. Benson*, 14 East 234; demised, *Curtis v. Wheeler*, 1 M. & W. 493; mortgaged, *Barrowes v. Grudin*, 1 Dow. & L. 213; taken upon execution at the suit of creditors of the tenant, *Doe v. Rideout*, 5 Taunt. 519; or pleaded as a term, *Tomkins v. Lawrence*, 8 C. & P. 729. Indeed, every tenancy from year to

year necessarily includes a term for years. It is a term for years, with the possibility of an indefinite continuity of yearly terms." The Court held that tenant from year to year was liable for permissive waste ; and it seems to us that the Court arrived at a conclusion more consonant to justice and logic than that upheld by the English authorities and by the text-books. It seems scarcely reasonable to hold that a man who holds by a definite lease for one year, and is therefore a tenant for years, should be made answerable for permissive waste, while another who holds from year to year, who is as certain to hold one year as is the tenant for years just mentioned, should be exempted from liability therefor. It is making a man's rights depend upon a mere name.

It may be noted that the position of the English authorities is weakened by admissions that the tenant from year to year is bound to exercise all due and reasonable care of the premises demised to him. See Addison on Torts, § 326, and the remarks of PATTERSON, J., in *Leach v. Thomas*, 7 C. & P. 327.

Farming on Shares.

MOULTON v. ROBINSON.—LADD v. ROBINSON.

Superior Court of Judicature of New Hampshire, December Term, 1853.

[Reported in 27 New Hampshire 550.]

Where lands are leased, reserving a part of the crops in lieu of rent, the contract takes effect by way of reservation, and the crops thus reserved remain the property of the landlord.

The landlord may maintain trespass for any injury done to the crops before severance, either alone, or jointly with the tenant.

If either the landlord or tenant sue severally, advantage can be taken of the nonjoinder only by plea in abatement, or in the assessment of damages.

Trespass will lie against a sheriff for taking and selling the whole property on an execution against one cotenant only.

Pettingill v. Bartlett, 1 N. H. Rep. 87, overruled.

THESE were actions of trespass, for taking, carrying away and converting to the defendant's own use, certain hay of the plaintiff. The defendant pleaded the general issue, and filed a brief statement, that the property was taken by him as a sheriff, by virtue of an execution against Ladd.

The hay was cut upon a farm in the occupation of Ladd, under a lease from the other plaintiff, Moulton. The material part of the lease is this: "The produce to be divided when harvested, excepting the hay, which is to be used equally on said farm, and the proceeds or gain of the stock to be divided when disposed of." The evidence tended to show that the defendant took and sold all of the hay, and without leaving to Ladd what is exempted from attachment.

The defendant's counsel contended, that neither Moulton nor Ladd had such a title as would sustain an action of trespass, and that Moulton cannot maintain trespass against an officer who takes the whole, upon an execution against one of the tenants in common. In the first action the Court directed a verdict for the defendant, and in the second for the plaintiff, subject to the opinion of the superior Court.

Hutchinson and J. Bell, for the plaintiffs.

Lyford, for the defendant.

BELL, J.—It is in vain to seek in the recent books of the English common law for the rules which should regulate the rights of landlord and tenant, as to that part of the produce of the land which the tenant agrees to render to the landlord, as his share of the income of the property in the nature of rent. The contract known here as letting at the halves, or letting on shares, and which is one of the most common, as well as the most convenient modes of letting farming property, seems to a great extent unknown there. Principles have found a place in the books there, which deny to a grantor or lessor the power to except, in his conveyance or lease, any part of the produce or crops growing upon the land, or to reserve, either as rent or in any other way, any part of such produce or crops. Thus Coke says (Co. Litt. 142 a), “but a man upon his feoffment or conveyance, cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land, or the like, for that should be repugnant to the grant. *Non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua.*”

It would seem that from the rule thus laid down, and repeated in later books, have arisen the decisions in that country and in this, which hold that the landlord has no interest in the hay or other crop, which the tenant has agreed to expend on the farm, and no remedy, if the tenant fails to perform his agreement, except upon his covenant, *Ridge-way v. Stafford*, 4 Eng. L. & E. 453, and that if land is let upon shares for a single crop that does not amount to a lease, but the possession remains in the owner. *Hare v. Celey*, Cro. El. 143; *Bradish v. Shenck*, 8 Johns. 151; *Bishop v. Doty*, 1 Vt. Rep. 37.

We think the law is not correctly stated in the books cited, or in the modern books which follow it. The true doctrine is laid down by Bracton, li. 2 fol. 32, b. and 249, cited by Coke, (Co. Litt. 47 a.) “*Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.*”

There can be no good reason why a grantor should not be at liberty to except out of his grant any part of it which he chooses not to include in his conveyance, or to reserve to himself any part of the income which

he has not agreed to sell, and which the purchaser has agreed he should retain. The questions which arise in cases of this kind are, merely questions of construction, and of the intention of the grantor, in the language he uses. If the exception is in its nature inconsistent with the grant, or such that it defeats or subverts the entire object of the grant, or any part of it distinctly and specifically described, it will be held void for repugnancy; but if it be consistent with the general object of the grant, if it merely operates to limit the effect of the general terms used in the grant, there, either an exception or reservation will be valid and effectual. Such is evidently the opinion of the author of the *Touchstone*, p. 79, where he says: "If the exception be such as is repugnant to the grant, and doth entirely subvert it and take away the fruit of it, as if a man grant a manor or land to another, excepting the profits thereof, or make a feoffment of a close of meadow or pasture, reserving or excepting all the grass of it, these are void exceptions." And Preston adds, [as a man may grant, so it is apprehended he may except the tonsure or vesture of a meadow. In short, whatever a man may grant in direct terms, he may, it is apprehended, except.] The objection being, as we regard it, not to the reservation of part of the profits of the land as such, but to any reservation, which substantially defeats the grant.

While we regard this as the true doctrine of the ancient common law, we consider all the cases where it is held that upon a letting on shares the lessor has an interest in the crops before they are severed, as effectually, though not in terms, supporting this doctrine. In most of these cases it has been held, that such letting on shares does not amount to a lease, but constitutes the lessor and lessee tenants in common of the premises, but while we agree that a reservation of a share of the crops constitutes the parties tenants in common of that crop, it seems to us by no means to follow, that they are tenants in common of the land, or that the agreement does not constitute a lease, or make the cultivators, tenants. The view taken by Livingston, J., in *Jackson v. Brownell*, 1 Johns. 272, seems to us in most respects correct and unanswerable. Speaking of such cultivators, he says: "They had every character of a tenant, and not of mere laborers for the owner of the soil. They took under a contract to possess for a year. They occupied the same house. They had an interest or estate in the land. They paid rent in grain. They might bring their own cattle on and reap what they pleased from

it, except grain, which was to be divided, and, what is very important, they had a right to the use of wood for burning, repairing, etc., and if they continued in possession, by mutual consent, after the end of the first year, a tacit renovation of the original contract would have been implied, and they could not have been dispossessed, without a notice to quit." As, then, in this class of cases, we think the cultivator must be regarded as a tenant, they must be considered as tending to establish the principle that a landlord may reserve a part of the profits of his land, as a compensation for the use of it.

The general principle clearly is, that the hirer of property *prima facie* becomes entitled to all the profits of it, during the time his interest continues. If this principle were universal, and not under the control of the parties, it would sustain the position that no part of the profits can be either excepted or reserved, but we think that, in the nature of the case, independent of the books, no one can find any reason for limiting the right of parties to make such contracts as they may find convenient to themselves in this respect; while in the case of personal property, which is naturally governed by the same rules, there is no restriction upon the owner, forbidding him to stipulate for a part of the profits of the article he lets to hire. The ship owner stipulates for a share of the freights, and the sheep owner agrees for a share of the wool, and of the increase of his flock; and we are not aware that any doubt was ever entertained of the propriety or legality of such contracts. *Chamberlain v. Shaw*, 18 Pick. 278.

The part of the profits of land reserved on a lease might, in the nature of things, admit of being regarded as rent or as an exception from the grant of the profits ordinarily implied in a lease, or letting to hire. But the result of one of these views would be essentially different from that of the other, upon the rights of the parties, lessor and lessee, to the accruing profits, anterior to the time when the lessor's share should be actually divided and set off to him.

If the lessor's share should be regarded as rent, then the whole produce might, perhaps, be regarded as the property of the tenant, and subject to his control, and consequently liable for his debts, until the share of the lessor is set off and delivered to him. This would result from the general idea of the nature of rent, as a *compensation paid* for the use of the property hired. A payment is a transfer of property from one person to another, while the delivery to the owner of his own property,

does not affect the property, that is, the right, but merely the possession, and cannot, without an abuse of terms, be regarded as a payment. To entitle the lessor's share of the profits to be regarded as rent, it seems necessary to consider the ordinary implied grant of the profits to exist in the case, and the crops, of course, to be the property of the tenant, until he discharges his contract, that is, pays his rent, by transferring a part to his landlord. If, on the contrary, the share of the landlord is considered as reserved or excepted, then the otherwise implied contract, that the tenant should have the entire profits, is limited and restricted to a part only of the profits, instead of including the whole; and the right of the landlord to the share of the profits stipulated to be his is unaffected by the contract of lease, and that share remains his during the whole time it is growing or accruing, in the same manner it would be if the tenant were merely his hired servant. The nature of the contract being much the same as if one of two tenants in common should hire his cotenant to carry on his half of the common property.

Which of these views of the relative rights of the parties to contracts of this kind should be adopted, in the absence of express decisions and authoritative declarations of the law, would be determined entirely by the consideration, which was best calculated to carry into effect the intentions of the parties, and was most consistent with the general policy of the law. And upon this question we find it impossible to doubt. It could never be the intention or consent of any judicious landlord, nor the wish of any honest tenant, that the former should have no security for his share of the profits but the honesty of his tenant; nor that the tenant should have it in his power to sell the entire crop, or subject it to the payment of his debts, when in equity and justice, neither he nor his creditors have the slightest claim to more than an undivided share of it. The policy of the law is to give such effect to the contracts of parties as will best carry their intentions into effect, whenever it can be done without hazard to the rights of others; and we are unable to see that this construction can in any way be made the instrument of injustice or fraud to any third person.

We think it is equally settled that a reservation of a part of the profits cannot be regarded as rent, by the books usually looked to as authoritative on such subjects; thus in the *Touchstone*, page 80, if one grant land yielding for rent money, corn, a horse, spars, a rose, or any such like thing, this is a good reservation, but if the reservation be of the grass,

or of the vesture of the land, or of a common, or other profit to be taken out of the land, these reservations, [considered as rents,] says Preston, are void.

So, 4 Cruise Dig. 312, "the profit reserved as rent must be certain, or that which may be reduced to a certainty by either party. It must also issue out of the thing granted, and not be a part of the thing itself, for a person cannot reserve a part of the annual profits themselves, as the vesture or herbage of the land," as rent, as we understand it.

And in Com. Landlord and Tenant 95, "A rent cannot be of part of the profits demised, as the herbage or vesture of the land, for that would be an exception out of the grant, not a rent reserved."

The idea of Preston, that if profits are reserved, they are not to be regarded as rent, appears to us sound. And the cases before referred to of letting on shares, are consistent with this view, and lose the character of anomalies, which otherwise seem to attach to them, when they are regarded as cases of reservation.

Though Lord Coke, (Co. Litt. 47 a.) in stating the distinction which he makes between exceptions and reservations, where he says: "And note a diversity between an exception, (which is ever of a part of the thing granted, and of a thing *in esse*,) for which *exceptis, salvo, præter*, and the like be apt words, and a reservation, which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised," seems to regard particular words and phrases as peculiarly adapted to express an exception or reservation, yet we take it to be now well settled that no particular language is required to express either, and that it is immaterial in what part of a conveyance the meaning of the parties appears. If there is an intention to except or reserve a part of the property, described in general terms, or any part of the income or profits of it, apparent in the premises, in the habendum, in the covenants, or conditions, or elsewhere, the construction will be made upon the whole deed, and the intention carried into effect. *Webster v. Atkinson*, 4 N. H. Rep. 21.

The effect of these views may be seen in the two most common cases of contracts relating to land, where they seem applicable. The first is the ordinary case of letting on shares. There, we hold, that the lessee is properly a tenant, having ordinarily, as against his landlord as well as others, the possession of the land, and the rights growing out of that relation. But the landlord having reserved a share of all the crops, or

of some of them, is, as to those crops, a tenant in common, with such rights in regard to the tenant as are not inconsistent with the right of possession of the soil held by him, and with all the rights of a tenant in common as to others. The tenant cannot sell or dispose of the share of the landlord, and the share of the latter cannot be taken, or levied upon, for the debts of the tenant. The rights of both parties are effectually secured. And as to this point, it is wholly immaterial whether the letting is for a single crop, or a single year, or for a series of years. Though it seems to have been supposed that something was dependent upon that circumstance. The nature of the contract seems to us to be in no degree dependent upon the length of time for which it continues.

The second case is that under consideration, where it is expressly agreed, or necessarily implied from the nature of the contract, that the tenant shall not acquire any right to a portion of the produce of the land, or that he shall acquire merely some limited and qualified interest. In that case, we hold that the general property in the whole of the specified produce is reserved to, and remains in the lessor, or it accrues to him, as it comes into being, while the tenant at the same time holds or acquires certain special interests in it; or the general property of the share reserved, remains in, or accrues to him, subject to such special interests of the tenant as are necessary, if any, to enable him to execute his part of the contract; while the general property of the share not reserved to the landlord, becomes vested in the tenant by virtue of the implied grant of the profits ordinarily resulting from every letting to hire, subject to such special interest, if any, as may be reserved to the landlord.

Of the cases thus indicated, that of a reservation of the entire produce of a certain kind, the case of *Kelly v. Weston*, 20 Maine Rep. (2 Ap.) 232, is an example. It was there held, in replevin by the landlord against a sheriff, that where a tenant agreed to cultivate and bag the hop crop for the year, in payment of the rent of the farm, the property of the hops was in the landlord; and the tenant acquired no title to the crop; and that no separation or delivery to the landlord was required, where the portion of the produce agreed upon as rent, is never to be the property of the tenant.

The case of a reservation of a share of all the produce, or of certain crops specified, is more common, and the diversity in the opinions of the

courts, who have decided cases of this kind, shows, we think, that they have been governed by no such clear and distinct principle as that we have attempted to establish.

In some of the cases it has been held that a contract of this kind, for a single year or crop, does not constitute a lease. *Bradish v. Schenck*, 8 Johns. 151; *Hare v. Celey*, Cro. El. 143; *Bishop v. Doty*, 1 Vt. Rep. 37; *Maverick v. Lewis*, 3 M'Cord 211; *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill 247. While in others it seems as clearly held that it does constitute a lease, and makes the parties landlord and tenant. *Jackson v. Brownell*, 1 Johns. 267; see 4 Kent Com. 95; *Hoskins v. Rhodes*, 1 G. & J. 266.

In some it is held that the owner and lessee are tenants in common of the crop, and entitled to join in an action for any injury done to it. *Hurd v. Darling*, 14 Vt. Rep. 214; *Walker v. Fitts*, 24 Pick. 191; *Putnam v. Wise*, 1 Hill 234; *Foote v. Calvin*, 3 Johns. 216; *Demott v. Hageman*, 8 Cow. 220. While in others it has been held that the owner alone has possession, and can alone maintain trespass for breaking the close. *Hare v. Celey*, Cro. El. 143; *Bradish v. Schenck*, 8 Johns. 151; *Putnam v. Wise*, 1 Hill 248. And in others, that where the share of the crops is agreed to be delivered to the owner, he has no interest until they are delivered. *Rinehart v. Oliviere*, 5 W. & S. 157; *Woodruff v. Adams*, 5 Blackf. 315; *Brainard v. Burton*, 5 Vt. Rep. 97. And that the tenant alone can maintain trespass for a breach of the demised premises during the term. *Woodruff v. Adams*, 5 Blackf. 315.

And in several cases, it is held that where a lease extends beyond a single crop, or a single year, the tenant has the entire property of the crops, and the landlord has no interest until his portion has been set off and delivered to him. *Stewart v. Doughty*, 9 Johns. 188. Though this seems questioned in *Putnam v. Wise*, 1 Hill 248.

In our view, whenever, upon a lease of land, either for one crop or one year, or for several years, the owner of the land is to receive a part of the productions of the land in lieu of rent, the contract operates and takes effect by way of reservation. The share reserved is always the property of the owner of the land, without severance or delivery, though both of these may be stipulated for. In the language of Bracton, "*Ille pars, quam retinet, semper cum eo est, et semper fuit.*" And it is therefore wholly unnecessary to resort to the idea that such a contract to hire is not a lease, or to restrict to cases of lettings for a single year, a prin-

ciple regarded by eminent judges as wise and beneficial. *Foote v. Calvin*, 3 Johns. 216; *Caswell v. Districh*, 15 Wend. 37.

Another case is of the character of that now under consideration, where the agreement of the parties to the lease is, that the crops of hay and fodder which may be grown upon the land, shall be consumed upon the farm, in feeding the stock kept upon it, for the common benefit; the agreement being, that the produce or income of the stock should be divided. Here the true construction of the agreement, upon the principles we have stated, would be, that the lessor excepts or reserves the hay, out of the general grant of the profits, implied upon the letting to hire; and instead of a general grant of the property, he substitutes a grant of a special and qualified interest, a right to use the same in one particular way, for the common benefit of both parties.

The case of *Lewis v. Lyman*, 22 Pick. 437, resembles the case before us, and was decided in accordance with our views, though upon reasons of a more general character. By a lease, under seal, it was agreed that the hay should all be fed out on the farm, and that half of the calves should be reared and divided. The hay and the calves were attached upon a writ against the tenant, and the action was brought by the lessor against the officer who made the attachment. It was held that the hay and the calves did not become the property of the tenant, so as to be liable to be attached for his debts. It was contended that the produce of the farm became the absolute property of the tenant, and that the only remedy of the plaintiff was upon his covenants against the tenant.

In delivering the opinion of the Court, Putnam, J., says, whatever technical objections may be raised, the provisions of the writing are perfectly intelligible, as well as consistent with the rules of good husbandry. The case must be determined according to the true construction of the contract, taking into consideration the whole of it together. The indenture, whereby the plaintiff demised, etc., the farm for one year, would, without explanation or qualification, seem to imply, that the lessor granted to the lessees all the produce for their own use, subjecting the same to their disposal, as well as to the attachments and levies of their creditors. But that part of the indenture is to be compared and construed with other parts, which are inconsistent with such implication. It must be considered in connection with the provision that all the hay and fodder is to be fed out on the farm. And we think that it was not the

intent, either of the plaintiff or of the tenants, that the latter should have at their own disposal all the hay and fodder which should be made upon the farm during the year. Taking the whole contract together, it is manifest that the tenants had a limited right or interest in the hay and fodder, only such a right or benefit as would result to them from having it given to the stock upon the farm, whereby their proportion of the produce of the stock would be increased. The contract cannot be understood as giving to the tenants a right to sell the hay from the farm for their own use. It cannot be supposed that it was intended to be subjected to their debts, and carried away from the farm. Such a construction would be unreasonable. All the produce except that part which was granted to the tenants, became and remained the property of the plaintiff. The provision in the contract, requiring the hay to be spent upon the farm, is conformable to the rules of good husbandry in England, and would be implied from the relation of landlord and tenant, if it were not expressed. Every tenant, where there is no particular agreement, dispensing with the engagement, is bound to cultivate his farm in a husbandmanlike manner, and to consume the produce on it. Buller, J., cited in *Brown v. Crump*, 1 Marsh. 567. The rules of good husbandry require, as a general rule, that the hay or other produce, at least, to the extent of sustaining the stock, should be spent upon the farm, as the means of preserving and continuing the capacity of production. According to the true construction of the contract the property in the hay never passed to the tenants, but, on the contrary, the hay was reserved and appropriated to be spent on the farm. The sheriff had no right to take away from the farm, by virtue of any attachments or executions against the tenants. The same principles were held to apply to the case of the calves.

This view of the rights of the parties to a lease, as drawn from a reasonable construction of the contract itself, must meet the approval of every one, as founded in sound common sense. It is adopted by the Supreme Court of Maine, in *Potter v. Cunningham*, 34 Maine Rep. (4 Red.) 192, in accordance with the case of *Kelly v. Weston*, 20 Maine Rep. (2 App.) 232, but substantially overruling *Turner v. Batchelder*, 17 Maine Rep. (5 Shep.) 257, which was mainly decided upon the authority of Co. Litt. 142, a., before cited. A similar view seems to be recognized in Vermont, in *White v. Morton*, 22 Vt. Rep. (7 Wash.) 15, and *Hero v. Darling*, 14 Vt. Rep. 214. And a leaning toward the same

view is apparent in the case of *Putnam v. Wise*, 1 Hill 234, against the case of *Stewart v. Doughty*, 9 Johns. 108.

In England it is held, in the very recent case of *Ridgway v. Stafford*, 4 Eng. L. & E. 453, S. C. 20 Law Jour. N. S. Ex. 226, that notwithstanding a covenant to expend the hay upon the land, the tenant has a right to sell the property unconditionally, and would be merely liable to his landlord for breach of covenant. From this case it is seen that by a statute the sheriff in England is not at liberty to carry off the premises any produce, which by the covenants of the lease, is to be consumed on the premises, thus recognizing the justice of the landlord's claim, according to the understanding of the community there, not only to hold his tenant, but to hold the specific property agreed to be used on the premises. Yet the idea of the exclusive right of the tenant to the crops, notwithstanding any stipulations of the lease, still holds its ground in that country.

It is not necessary here to consider how far the principle which we have endeavored to establish, that the landlord may except or reserve any portion of the growing crops by express contract, so that the tenant will acquire either no interest, or a very limited interest in them, may affect the case of hay and fodder, which, by the rules of good husbandry, is required to be spent upon the farm on which it is raised; yet we may remark that there is no obvious distinction between the case of crops, expressly excepted by contract, and those impliedly excepted by the policy of the law; and there can be no doubts that the real objects of parties would be more truly carried into effect, by holding that the tenant acquires neither the ownership nor the right to sell the hay and fodder required to be used on the place, and that the excess alone, above that requisite part, is to be regarded as profits, than by the doctrine of *Ridgway v. Stafford*, which gives the property to the tenant.

Adopting these views of the rights of lessor and lessee, as to the property stipulated to be used upon the land, there then arises a question, what are the relative rights of action of these parties as to third persons? And it would seem that wherever the reservation is of an entire crop to the landlord, as of the hops in the case of *Kelly v. Weston*, before cited, there the entire property is always in him, and he alone can bring an action for any wrong done to them, the obligation of the tenant to cultivate and harvest being really of the nature of a contract for services. Where the reservation is of an undivided share, the property of that

share is always in the lessor, by virtue of his reservation, while the property of the residue is always in the tenant, by virtue of the implied grant of profits, and they are, therefore, tenants in common of the crop until a division, and, upon the ordinary rules of law, must join in any action for injuries to the joint property.

Where the reservation is of the crops, or some part of them, to be used upon the land, the general property and right to them remains in the landlord, but during the continuance of the lease the possession remains common, because they have a common interest in the cultivation and application of them, the tenant agreeing to cultivate, harvest and use the crop for the common benefit of both. As tenants in common, they must ordinarily bring their action jointly.

In the present case, separate actions of trespass are brought by both the landlord and tenant, and it is denied that either has a right to maintain such action. But it is not seen that any objection exists to the right of the tenant to maintain trespass against a mere wrongdoer, since he has the actual possession, jointly with and for his co-tenant; and it is well settled that in actions *ex delicto*, if a party, who ought to join, be omitted, the objection can only be taken by plea in abatement, or by an apportionment of the damages on the trial. *Wilson v. Gamble*, 9 N. H. Rep. 74; *Pickering v. Pickering*, 11 N. H. Rep. 141. But in this case, the attachment appears to have been rightful, as regards the tenant, as to all the hay and fodder in which he had any interest, except so much as was by law exempted from attachment. As to that part of the property, he is entitled to maintain his action, and notwithstanding the statute provision relative to actions upon the case against sheriffs, the action of trespass is the usual and proper remedy for his case. *Hill v. Loomis*, 6 N. H. Rep. 263; *Peverly v. Sayle*, 10 N. H. Rep. 356.

In the other case, the action by the landlord, the objection as to the non-joinder is met by the answer given in the case of the tenant, that no plea in abatement is filed; and there is a further answer suggested by the case of *Lathrop v. Arnold*, 25 Maine Rep. (12 Shep.) 136, that the officer might lawfully take the property, by virtue of an execution against one of the tenants in common, and sell the interest of that one, and deliver the property to the purchaser, who would become a tenant in common with the other owner. The injury is not joint, when the share of one tenant in common is taken and sold, for as it respects that one the justification is complete; and if it is not so, it is imperfect, for some

reason, with which the other has no concern. The tenants in common do not suffer a joint injury, and they are not jointly interested in the damages to be recovered. *Melville v. Brown*, 15 Mass. 82.

But it is further objected to the action of the landlord, that he is not entitled to maintain this action of trespass, because he was not in possession of the property, for the taking of which the action is brought, because the actual possession of it was in the tenant, who had, during the actual continuance of his lease, the right to keep it and to control it, without any interference of the landlord. We take the general rule to be, that if the general owner parts with the possession, and the bailee acquires the exclusive right to the use, the owner is confined to his action upon the case, his interest being in its nature reversionary. But, we think, this rule does not apply in this case. As we have suggested, the utmost interest acquired by a tenant in crops, agreed to be consumed upon the place, and of which the general property is reserved by the landlord, is a common interest in the possession and application of the property, making him a tenant in common of the possession. Of such tenants the general rule is, that the possession of one is the possession of both. And we cannot perceive that there is any reason, in the absence of express stipulations to that effect, to presume a grant of any exclusive rights of possession to the tenant of property reserved by their contract for the common benefit.

The remaining question is, whether a sheriff, who has levied an execution against one co-tenant upon the common property, and has proceeded to sell the whole property, is liable to an action of trespass or trover, at the suit of the co-tenant, not party to the execution. This question has been the subject of decision here and elsewhere. In the case of *Pettengill v. Bartlett*, 1 N. H. Rep. 87, it was decided, in a case like the present, that trespass could not be maintained against the sheriff, on the ground that the sale by the sheriff could not effect the title of the co-tenant, not named in this process. This decision, it is suggested to us, is at variance with the decisions of other very respectable courts in other jurisdictions, and cannot be reconciled with the decisions of this Court, in more recent cases, presenting the same question between other parties, and we are, therefore, desired to reconsider the question. That case was decided in 1817. The same question arose the next year, in the Supreme Court of Massachusetts, in the case of *Melville v. Brown*, 15 Mass. Rep. 82. The facts were the same as in *Pettengill v. Bartlett*, and it was there

decided that the officer was liable as a trespasser. In *Lathrop v. Arnold*, 25 Maine Rep. (12 Shep.) 136, a like decision was made. In *Weld v. Oliver*, 21 Pick. 559, and *White v. Morton*, 22 Vt. Rep. (7 Wash.) 15, it was held that, in such a case, trover might be maintained by the co-tenant against the sheriff, for his undivided share of the property.

It has been held, in many cases, that a tenant in common may maintain trover against his co-tenant, for a sale and delivery of the whole property, though it is not questioned that the title of the co-tenant does not pass by such a sale. Thus in *White v. Phelps*, 12 N. H. Rep. 382, it was held by Parker, C. J., that the general principle is, that, assuming to one's self the property and right of disposing of another man's goods, is a conversion. It is so in the case of a sale of the entire property by a tenant in common. The following are to the same point. *Gilbert v. Dickinson*, 7 Wend. 449; *Hyde v. Stone*, 9 Cow. 230; *Wilson v. Reed*, 3 Johns. 175; *Barton v. Williams*, 5 B. & A. 395; *McC. & Y.* 406; *Guyther v. Pettijohn*, 6 Ired. 388; *Farr v. Smith*, 9 Wend. 338; *Rains v. McNary*, 4 Humph. 356; *White v. Osborn*, 21 Wend. 72.

It is urged with much force, that if it is a conversion for a tenant in common to sell the whole property, *a fortiori*, it must be a conversion for a third person to make such sale; and that it makes an officer a trespasser *ab initio*, if he wrongfully converts the property which he has rightfully taken into his possession. It is said, too, that these cases strike out the foundation of the decision in *Pettengill v. Bartlett*, since they show that the seller, in such cases, may be liable in trespass or trover, though the title to the property does not, in any of these cases, pass by the sale.

We are inclined to admit the soundness of these arguments, and to regard the case of *White v. Phelps*, as furnishing the true rule of the law. And we are, therefore, of the opinion, that if a sheriff takes into his possession the property of co-tenants, upon process against one only, and sells the whole, it is an abuse of his authority, which renders him liable to the co-tenant for the value of his share, as a trespasser *ab initio*, either in trover or trespass.

In the first action, the verdict must be set aside. In the second, judgment must be rendered on the verdict.

Farming on shares, or that species of letting land by the terms of which the owner or lessor receives no regular fixed rent, but becomes entitled to a share of the crop raised upon his land by the occupier or lessee, in other words, becomes jointly interested with him in the products of the land, may be regarded as a branch of the law of real property peculiarly American in character. It seems to have been almost, if not altogether, unknown in England, and, indeed, according to Lord Coke, such a contract of letting would not have been legal, for Coke says: "But a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that would be repugnant to the grant *non debet enim esse reservatio de proficuis ipsis quia ea conceduntur sed de redditu novo extra proficua*," Co. Lit. 143 a; and this position is supported by St. Germain, who states the law as follows: "If a man make a feoffment and reserve the profits, or any part of the profit, as the grass, wood, or such other, that reservation is void in the law," Doct. & Student, Dial. II., Ch. 22. Bracton, however, whom Coke cites, says: "*Poterint enim quis rem dare et partem rei retinere vel partem de pertinentiis et illa pars quam retinet semper cum eo est et semper fuit*," Lib. 2, fol. 32 b, 249. Coke, it is true, applies the above citation only to the reservation of a certain specified portion of land out of a grant in general terms, but there is nothing in the statement in Bracton which would militate against, or which would exclude, a reservation of part of the profits of land granted; and the true sense of the rule which prohibits exceptions or reservations by the grantor out of the thing granted as repugnant to the grant and the limitation of the same rule are well stated by BELL, J., in *Moulton v. Robinson*, 27 N. H. 550: "If the exception is in its nature inconsistent with the grant, or such that it defeats or subverts the entire object of the grant, or any part of it distinctly and specifically described, it will be held void for repugnancy; but if it be consistent with the general object of the grant, if it merely operates to limit the effect of the general terms used in the grant, then either an exception or reservation will be valid and effectual."

Extensive Adoption of Practice of Farming on Shares in the United States.

In the United States farming on shares has been a common practice from early days, and soon became very widely adopted. In Pennsylvania, in 1829, it was said by ROGERS, J.: "In consequence of the fluctuation in prices, such a thing as a fixed rent, either in kind or money, is scarcely known. We have almost always adopted the mode of renting for a share of the produce of a farm, which is preferred by tenant and landlord. If

there is an advance in price or an abundant harvest, both partake of the benefit; and if the price should be low or the crop should fail, the tenant avoids ruin," *Fry v. Jones*, 2 Rawle 12. And in addition to the reason suggested by the learned Judge, another and excellent one may be found in the fact that the practice affords a way by which the landlord may be secured in his right to a return of something from his land without being dependent altogether upon his tenant's solvency or honesty; see *Guest v. Opdyke*, 31 N. J. Law 552.

Distinction between Contract Creating Ordinary Tenancy and One Creating a Letting on Shares.

It is sometimes a little difficult to distinguish between a case of ordinary tenancy and a letting on shares, and this question has been already treated on page 50, but the test seems to be found in the answer to the question, does the instrument or contract of letting contain any provision according to which the specific products of the land itself are to be divided between the parties to the contract? If it contain such a provision, the contract is one of letting on shares; if it do not contain such a provision, but provides for a rent otherwise derived, it is an ordinary lease, *Putnam v. Wise*, 1 Hill 235; *Dinehart v. Wilson*, 15 Barb. 595. A mere reservation of rent in kind will not constitute the contract a letting on shares, for the grain or corn reserved may be purchased elsewhere and delivered, *Newcomb v. Ramer*, 2 Johns. 421, note; and it is also held that there may be a case of farming on shares where the contract was that the occupier should pay the owner "the value of one-half" of the produce, the Court saying: "The point is that there was to be a division, and that the occupant or cultivator was not to pay a certain number of bushels of grain or a certain number of tons of hay as a rent for the premises, so as to make him a tenant," *Tanner v. Hills*, 44 Barb. 428.

Distinction between Mortgage of Crops to be Raised and Farming on Shares.

A case exceptional in its conditions and which makes a distinction between a mortgage of crops to be raised and a farming on shares is found in a case decided by the Supreme Court of Wisconsin, *Lanyon v. Woodward*, 13 N. W. Rep. 863. In that case, in consideration of seed advanced, furnished, credited, and delivered to them, the cultivators agreed to raise on their own land a crop of flaxseed, and to deliver to Lanyon on or before December 1, 1879, 83 $\frac{1}{2}$ bushels of prime flaxseed, or if through failure of the crop they were unable to do so, then to pay on demand the value of the

seed in money, at the time of demand, with interest, and further agreed to harvest, thresh, and clean the entire crop, and deliver the same to Lanyon at a specified price, and in case any further "advances" were made, to pay for them in flaxseed at the same price; and it was further agreed that the title to the seed furnished and the crop to be raised therefrom, until settled for, should be the property of the said Lanyon. In a contest between Lanyon and one who had bought the cultivator's interest at a sheriff's sale, with notice of the contract, it was held the contract was not a mortgage of the crop not yet *in esse*, and therefore void, under a line of Wisconsin decisions cited by the Court, but a joint adventure of the parties to the contract, a farming on shares, and the Court upheld the right of Lanyon in the crop as against the purchaser at sheriff's sale. From the decision, however, CASSODAY, J., dissented, in a strong opinion, in the course of which he said: "For myself I am unable to understand how Pettis & Moss could 'contract for the raising of a crop of flaxseed on shares,' under a contract in which the whole crop of flaxseed should be and remain the property of the plaintiffs. Nor am I able to understand what share would remain for Pettis & Moss of the crop raised by themselves, on their own land, if 'the plaintiffs were to have the *whole crop*' 'for *their* share of the adventure.' Nor am I able to understand why Pettis & Moss agreed in the contract 'to sell' *their* 'entire crop' of flaxseed to the plaintiffs, or to their order, at the place and time named, if it was to be, the moment it came into existence, the property of the plaintiffs, and at no time to be the property of Pettis & Moss, though raised by them on their own land. Nor am I able to discover in the contract anything which the plaintiffs and Pettis & Moss were to have or own in common, nor in which each party was to have a 'share' or take a 'venture.' The plaintiffs were simply to be repaid with interest for all that had been 'advanced' by and 'credited' to them, and for all they might thereafter advance to Pettis & Moss. If the plaintiffs got anything more, it was to be by a sale to them from Pettis & Moss for a stipulated price, which they were to pay. Such being the contract, I must regard the seed 'furnished' and 'advanced' by and 'credited' to the plaintiffs at the time of making the contract as an absolute sale on credit on the one hand, and an absolute purchase on credit on the other, with a contract which in effect was a chattel mortgage back to the vendors on the seed, to secure to them the payment of the value of $83\frac{1}{8}$ bushels of such seed, December 1, 1879."

Relation of Parties to Contract of Farming on Shares.

Some difficulty has been experienced by the courts in determining precisely the relation created between the parties by a contract to farm on

shares, see *Doty v. Heth*, 52 Miss. 530; but it will readily be seen that a joint interest in the amount of the crops to be raised upon a certain piece of land can arise in three ways: the owner of the land and the occupier may be interested directly, each having a title to his proportion of the growing crop; or the landowner may have parted with his land and retained no title to the possession of it, or of anything pertaining to it, and be simply interested in the crop because his rent is to be a certain proportionate part thereof; or again, the landowner may keep the land and crop entirely in his own hands, and be bound merely to allow the cultivator a proportion of the products in return for his labor and services in cultivation. It will also be seen that the rights of the parties under these different circumstances will vary greatly. We shall therefore treat the subject as it naturally divides itself, and after looking at the rights and liabilities of the parties to each class of contract, will consider how the courts have been guided in determining to which class contracts brought before them should be referred.

Classes of Contracts.

The three classes of contracts of farming on shares are: 1. Where the contract is so made that the relation of landlord and tenant will, at least to a very great extent, exist between the owner and the occupier of the land, the share of the crop to be received by the former standing as a rent.

2. Where the contract renders the owner and occupier co-adventurers in an agricultural enterprise and tenants in common of the crop, though not of the land out of which the crop is raised.

3. Where the contract renders the cultivator the servant of the landowner, and the share to be given to the former partakes of the nature of wages in kind to be paid him for his labor and services in cultivating the land.

First Class—Where Relation of Landlord and Tenant to a great Extent Exists.

1. The existence of the relation of landlord and tenant is not inconsistent with a contract for farming on shares, see *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Id. 372; *Herskell v. Bushnell*, 37 Conn. 36; *Swanner v. Swanner*, 50 Ala. 66 (reversing, as to this point, the decision of the lower court); *Johnson v. Hoffman*, 53 Mo. 504; and a letting on shares has been held a lease, within the prohibition of leasing; thus, in *Jackson ex d. Colden v. Brownell*, 1 Johns. 267, A. and B. were tenants of a tract of two hundred and seventy-eight acres, under a lease which contained a condition

that there should not be more than one family or tenant to every one hundred acres of the tract. A. and B. each let on shares one-half of his land for one year. The Court held that this constituted a breach of the condition, and that those coming in to work on shares were tenants; accordingly, in cases of farming on shares which fall within the first class mentioned above, the rights and obligations of the parties bear a very close resemblance to those which characterize the ordinary relation of landlord and tenant. The possession of the land is with the occupier or cultivator, *Rees v. Baker*, 4 G. Greene (Iowa) 461; *Johnston v. Smith*, 3 P. & W. 496; hence it has been held that he can recover for the pasturage of the cattle of third persons upon the demised land without joining the landowner, *Cornell v. Dean*, 105 Mass. 435; and can maintain forcible entry and detainer against the landlord, *Johnson v. Hoffman*, 53 Mo. 504; and the landowner during the continuance of the contract cannot maintain trespass for an injury to the possession, *Wentworth v. Portsmouth and Dover R. R.*, 55 N. H. 540; or even enter to take his share of the proceeds, *Long v. Seavers*, 103 Pa. St. 517, and see *Haywood v. Rogers*, 73 N. C. 320; and the title to the whole crop is in the cultivator until the landlord's share is payable, severed and set out or delivered to him according to the terms of the contract, *Woodruff v. Adams*, 5 Blackf. 317; *Lathrop v. Rogers*, 1 Ind. 554; *Rinehart v. Olwine*, 5 W. & S. 157; *Ream v. Harnish*, 45 Pa. St. 376; *Burns v. Cooper*, 31 Id. 426; *Rees v. Baker*, 4 G. Greene (Iowa) 461; *Townsend v. Isenberger*, 45 Iowa 670; *Lufkin v. Preston*, 52 Id. 235; *Symonds v. Hall*, 37 Me. 354; *Wilber v. Sisson*, 53 Barb. 258; *Waltson v. Bryan*, 64 N. C. 764; *Ross v. Swaringer*, 9 Ired. Law 481; *Harrison v. Ricks*, 71 N. C. 7; *Deaver v. Rice*, 4 Dev. & Bat. 431; the landlord cannot, until the share or rent is set out to him, maintain replevin therefor, *Rocketts v. Richardson*, 85 Ind. 508; the fact that the landlord is to receive his share in "standing rows" of corn will not give him a right of possession prior to a division, *Frout v. Hardin*, 56 Ind. 165; hence if the lessor take his portion of the crop before division and setting out to him, he is liable in trover, *Ross v. Swaringer*, 9 Ired. Law 481; if he or his assignee enter upon or turn animals upon the land, he is liable in trespass, *Lathrop v. Rogers*, 1 Ind. 554; but the cultivator, if he carry off the entire crop which is to be divided, is not liable in trespass to the landowner. Thus, in *Briggs v. Thompson*, 9 Pa. St. 338, there was a demise on shares for one year; the tenant housed the hay crop in the barn and quit possession of the premises; the landlord entered, locked up the hay and rented the land to another person; the tenant returned, entered on the premises, and carried away all the hay. It was held that he was not liable to the landlord in trespass. A purchaser at sheriff's sale of the landlord's right,

title, and interest in the land will acquire title to the landlord's share of the produce when it falls due as rent, *Townsend v. Isenberger*, 45 Iowa 670; and if the landlord's share of the growing grain is levied on and sold as personalty under a writ of *fiery facias*, there is not worked such a severance as will pass the landlord's title to the grain as against a subsequent purchaser of the land at sheriff's sale who obtains his deed before the rent falls due, *Long v. Seavers*, 103 Pa. St. 517; but the owner's assignment of his share has been held in Iowa valid against one having notice of the assignment, *Lufkin v. Preston*, 52 Iowa 235; and it is also held that a sale by the landlord in good faith and for a valid consideration and with the intent of vesting a present interest in his share, will be good, although made prior to division, *Howell v. Pugh*, 27 Kan. 702.

Until the rent falls due the landowner has not even a lien upon the crop, *Harrison v. Ricks*, 71 N. C. 7; *Deaver v. Rice*, 4 Dev. & Bat. 431; *Ross v. Swaringer*, 9 Ired. Law 481; and the North Carolina courts have gone so far as to consider the presence in a contract of a stipulation for a lien as strong evidence that the relation of landlord and tenant was not intended to be created, *Id.*; the law is otherwise in Ohio and Iowa, where the landlord has a lien upon the crop, *Case v. Hart*, 11 Ohio 364; *Secrist v. Stivers*, 35 Iowa 580; and the right of the parties to make contracts whereby the landlord will retain the control of the crops until divided or sold is recognized in *Edson v. Colbourn*, 28 Vt. 631; and the contract will be given effect to in accordance with the intention of the parties; thus, in *Dunning v. South*, 62 Ill. 175, A. leased a farm on shares to B., reserving the property in the crops until his share was given, the Court held that the possession was in B. and that he could maintain replevin against A., for the latter's property was only as security.

Distinction between a Case of Farming on Shares of the First Class and the Ordinary Case of Landlord and Tenant.

The principal difference between this species of farming on shares and the ordinary case of landlord and tenant, besides the manner of ascertaining the amount of rent, is found in fixing the time at which the rent becomes due. In the ordinary case it falls due at a certain time; in the case of farming on shares it is due and payable only at the harvest time, when the crop is harvested, *Lamberton v. Stouffer*, 55 Pa. St. 284; *Johnston v. Smith*, 3 P. & W. 496; and see *Wilkins v. Vashbinder*, 7 Watts 378; and will remain an incident of the reversion until such time, even though the letting on shares be for a definite period, which has expired before the arrival of the harvest season; hence, as between the devisee and

the executor of the landlord, the right to the landlord's share of the crop is referred to the time at which the crop was cut, and not to the expiration of the term for which the said rent was to be paid, *Cobel v. Cobel*, 8 Pa. St. 342, and see *Burns v. Cooper*, 31 Pa. St. 426.

The landowner cannot before division maintain assumpsit to recover his share of the crop if it be withheld from him, *Caswell v. Districh*, 15 Wend. 379; but in *Schmitt v. Casilius*, 16 Reporter 497 (Supreme Court of Minnesota, July, 1883), where the crop had been raised and had been partially threshed, and the plaintiff landowner having demanded her portion of the crop, the defendant had refused to divide the grain, or deliver to the plaintiff her share, the Court granted an injunction and appointed a receiver.

Second Class—Where Owner and Occupier are Tenants in Common of the Crops Raised.

In the second class the main characteristic is, that the owner and cultivator of the land are tenants in common of the crop, *Putnam v. Wise*, 1 Hill 235; *Walker v. Fitts*, 24 Pick. 191; *Ladd v. Robinson*, 27 N. H. 550; *Hatch v. Hart*, 40 Id. 93; *Carr v. Dodge*, Id. 403; *Brown v. Lincoln*, 47 N. H. 468; *De Mott v. Hagerman*, 8 Cow. 220; *Daniels v. Brown*, 34 N. H. 454; *Dinehart v. Wilson*, 15 Barb. 595; *Betts v. Ratliff*, 50 Miss. 561; *Ponder v. Rhea*, 32 Ark. 435; *Wilber v. Sisson*, 53 Barb. 258; *State v. Jewell*, 34 N. J. Law 259; *Armstrong v. Bicknell*, 2 Lans. 216; *Creel v. Kirkham*, 47 Ill. 344; although not necessarily of the land out of which the crops are raised, *Doty v. Heth*, 52 Miss. 530; *Blake v. Coats*, 3 G. Greene (Iowa), 548; and this tenancy in common continues until a division of the crop, *Warner v. Hoisington*, 42 Vt. 94; *State v. Jewell*, 34 N. J. Law 259.

The usual consequences of a tenancy in common follow, thus one of the parties to the cotenancy cannot bring replevin against the other for his share, *Ferrall v. Kent*, 4 Gill 209; and prior to a division the landowner cannot maintain assumpsit for his share, Id. In *M'Laughlin v. Salley*, 46 Mich. 219, where, a lease having been cancelled, the landlord told the tenant to put in his wheat, and that he should have his just and lawful share, the Court held that the landlord and tenant were tenants in common of the wheat; and further held that the tenant could maintain assumpsit for his share; but it may be noted that in this case there was an express promise by the landlord to give the tenant his share. If the occupier take the whole crop to himself he is not liable in trespass, *Daniels v. Brown*, 34 N. H. 454; *Otis v. Thompson*, Hill & Denio 131; or in trover, unless he entirely destroy the rights of his cotenant, *Hurd v. Darling*, 14

Vt. 214; but in *Lowe v. Miller*, 3 Gratt. 205, it was held that trover would lie if the occupier and tenant in common took the entire crop, "because the property is of such a nature as to be necessarily destroyed by the use thereof by himself or others claiming under him." The occupier cannot be guilty of larceny, although he take the landlord's share, and that even where a statute declares that the crop shall be deemed to be in the landowner's possession, when the statute makes a distinction between actual and constructive possession, *State v. Copeland*, 86 N. C. 691. But it has been held that where the parties to the contract agreed that neither should sell any of the property or produce without the consent of both, and that the landlord should have a lien on all the produce for the faithful performance by the occupier of his agreement, and the occupier sold part of the produce without the landlord's consent and retained the price, the landlord could, before the expiration of the term of letting, maintain trespass against the tenant, *Willmarth v. Pratt*, 56 Vt. 474. The landlord is not liable in trespass for damage done to the crop short of its actual destruction; thus, in *Wells v. Hollenbeck*, 37 Mich. 504, the cultivator brought an action against the landowner for damage done to the crop by sheep which the latter had turned on the land. CAMPBELL, J., in delivering the opinion of the Court, said: "The injury was neither an ouster nor a destruction of the entirety, but damage to a small portion of the whole crop. No authority has been cited which will justify trespass by one cotenant against another for any such partial damage to the common property. It is an attempt to sue a man for trespass committed against himself. No such suit is maintainable on any principle." After a division the cultivator has no right to enter upon the part of the field in which the landlord's share has been set apart; and if he enter thereon, or if he take away the landlord's share, he is liable in trespass, *Warner v. Hoisington*, 42 Vt. 94. Where, however, the time for which the land was let to be farmed on shares has expired, and the crop has not yet been divided, the cultivator is entitled to a reasonable time within which to enter and remove his share, and it is held, that if after making such entry he take away not only his but also the landlord's share, he is not liable in trespass, *Daniels v. Brown*, 34 N. H. 454; such entry must, however, be peaceable, for if he enter by the use of violence his proceeding becomes a trespass *ab initio*, and he will be liable not only for his entry but also for the landlord's share of the crop, *Id.*

Where it is a matter to be determined by election, whether the relation of the parties to the contract is that of tenant in common or not, no title as such will vest until the election is made. Thus in *Lathrop v. Rogers*, 1 Ind. 554, C. rented land to L., and by the terms of the contract was to receive

either 12½ bushels of grain per acre or one-half the product of the land, at his election; no election having been made, his assignee was held a trespasser in turning animals upon the land; and in *Tinker v. Cobb*, 39 Vt. 483, C. moved on to K.'s farm to cultivate it under an agreement that K. should furnish the means and have a lien on the crop for his advances, and that C. should cut the hay either for a reasonable compensation or on shares, as K. should determine; it was held that until K. made his election there was no title to any of the hay in C.; and see *Deaver v. Rice*, 4 Dev. & Bat. 431.

The interest of the cultivator is such that he may mortgage it, *Fiquet v. Allison*, 12 Mich. 328; and the interests of both cultivator and owner in the crops are such that they are subject to execution for the debts of each respectively, *Walker v. Fitts*, 24 Pick. 191; *Brown v. Jacquette*, 94 Pa. St. 113; but after a levy only the undivided interest of the debtor can be sold, for the officer has no power to make a division of the crop, *Walker v. Fitts*, *supra*.

Where the crop is carried away by a third person, the landowner and the occupier can maintain a joint action of trespass therefor, *Foote v. Colvin*, 3 Johns. 216; and in general for an injury to the crop one cotenant cannot alone maintain trespass, see *Moulton v. Robinson*, 27 N. H. 550, although for trespass upon the land itself the landowner may sue alone; and in *Bradish v. Schenck*, 8 Johns. 151, it is held that he must sue alone; but in *White v. Morton*, 22 Vt. 15, it was held that where an officer took and sold the entire crop under an execution against the landowner alone he was liable to the occupier; and so in *Smyth v. Tankersley*, 20 Ala. 212; and in *Hatch v. Hart*, 40 N. H. 93, where the entire hay crop was taken under an execution against the occupier, and there was evidence to show an abandonment of the premises by the occupier prior to the taking, and that he assented to a sale of his half of the crop by the officer, it was held that the landowner might sue alone. It is to be noted, however, that in *Hatch v. Hart* the contract was that the crops should be divided, and that the fodder should be consumed on the farm, and the decision went upon the ground that the tenant had no such property in the hay crop as would authorize him to sell it or the officer to attach it upon an execution against the tenant.

As a consequence of the landlord's share not being considered as rent, it is held that his share of grain not severed from the realty at the time of his death will go to his devisee and not to his executor, *Creel v. Kirkham*, 47 Ill. 344.

A striking consequence of the landowner's share not being considered as rent is noticeable in New York; as we have seen, *ante*, p. 45, the constitution of that State avoids any lease or grant of agricultural land for

a longer period than twelve years, wherein shall be reserved any rent or service of any kind; it is held by the courts that a contract of farming on shares does not fall within the constitutional provision, *Parsell v. Stryker*, 41 N. Y. (Hand) 480. In that case, in considering a contract to farm upon shares, the Court of Appeals, JAMES, J., delivering the opinion, said: "The consideration provided by the instrument in question for the occupation of the farm specified therein was not rent or service within the intent of the clause of the constitution above cited. That clause of the constitution, as all know, was not aimed at agreements such as this, but at manorial leases. The agreement was for the mutual occupancy and enjoyment of the farm and utensils thereon during the life of the grandfather, each aiding in carrying it on and caring for it; plaintiff to do the labor and be at the expense necessary to keep the farm in repair, to do all necessary chores for the old man when he was unable to do them himself, and to furnish two-thirds of the seed and of the stock necessary to keep on the farm, and the grandfather one-third the grain, to pay for threshing one-third the grain and one-third of keeping the building in repair. The income, profits . . . were to be divided, two-thirds to the plaintiff and one-third to the old man . . . and in further consideration for the performance by the plaintiff of all the requirements of the agreement on his part the grandfather was to give him the said farm after his death free of all claim except for the necessary support of the grandfather's wife. . . .

"This was a continuing consideration and not rent, *Stephens v. Reynolds* [6 N. Y. 458]. The services of the plaintiff upon the farm and for the grandfather were not entirely for the use of the farm, but in part for the use of personal property, and the contract to give him the farm at the grandfather's death."

Where the occupier assigns his contract to a third person, the assignee becomes a tenant in common with the owner, *Ferrall v. Kent*, 4 Gill 209; if he admits another to participation in his contract all become tenants in common, *Putnam v. Wise*, 1 Hill 234; and where the occupier agreed with another to thresh the grain he had raised and to share the products it was held that all parties became tenants in common of the crop, *Tupp v. Riley*, 15 Barb. 333.

The proportions of the crop to be given to the landowner and to the occupier may be fixed by a reference to the custom of the neighborhood, and a stipulation that the crop shall be divided according to such custom is valid, *Clem v. Martin*, 34 Ind. 341; and in *McLaughlin v. Salley*, 46 Mich. 219, where, after a lease had been cancelled, the landlord told the tenant to put in his fall wheat and he should have his just and lawful share, it was held that the amount to be taken by landlord and tenant

should be regulated by custom. Custom may also be applied to determine to what species of crops the landlord is entitled; thus in *Brown v. Burrington*, 36 Vt. 40, a custom that the landlord should share the sugar produced on the premises only when he furnished utensils for making it, but otherwise should be entitled only to his share of the sugar in the plant or tree, was upheld; and also to determine questions relative to delivery by the occupier; thus in *Wilcoxon v. Bowles*, 1 La. Ann. 230, a custom to deliver sugar in hogsheads or barrels was recognized, and it was held that where there was no stipulation with reference to delivery of a different character, the cultivator would not be entitled to an allowance for hogsheads or barrels.

In *Taylor v. Bradley*, 4 Abb. App. 363, the question of the measure of damages for a breach of a contract for farming on shares by the landowner, as where he refused to permit the other party to the contract to farm on shares to occupy the land, arose, and the Court held that the measure was not the same as in the case of a lease, or yet the same as in a case of hiring, but was the value of the contract, which value was a question to be determined by the jury. WOODRUFF, J., in delivering the opinion, said: "Such a privilege may be worth nothing. It may be worth more than the labor and expense attending it. I think it is a proper subject for proof in that form." The Court, however, did not determine whether the value of the contract could be proved by the opinion of witnesses.

Third Class—Where Relation of Owner and Occupier is Quasi that of Master and Servant.

3. Of the third class the main characteristic is that the relation between the parties is *quo ad* the cultivation of the land, that of master and servant, or at least that of contractors for the performance of a piece of work thereon, *Harrison v. Ricks*, 71 N. C. 7; *M'Neeley v. Hart*, 10 Ired. Law 63; *State v. Jones*, 2 Dev. & Bat. 544; *Brazier v. Ansley*, 11 Id. 12; *Chase M'Donnell*, 24 Ill. 236. In cases of this class the property and possession of the crop remain in the owner of the land, *Appling v. Odom*, 46 Ga. 583; *Adams v. M'Kesson's Ex'x*, 53 Pa. St. 81; *Haywood v. Rogers*, 73 N. C. 320; *Neal v. Bellamy*, Id. 384; it is his place to divide the crop, *Harrison v. Ricks*, *supra*; and before division the cropper cannot convey a legal title to his share of the crop, *M'Neeley v. Hart*, *supra*; indeed, in *Appling v. Odom*, *supra*, M'CAY, J., said: "The case of the cropper is rather a mode of paying wages than a tenancy. The title to the crop, subject to his wages, is in the owner of the land." The landowner alone can maintain trespass for damage to the crop or land, *Adams v. M'Kesson's Ex'x*, *supra*; and as the relation of landlord and tenant does not exist, he cannot distrain, Id.

As against a cropper, an agreement that the landlord may retain the occupier's portion of the crop until paid for advances made by him to the occupier is valid, and this right has been upheld as against a mortgagee of the cropper, the Court remarking, that as against a *tenant*, a different rule might obtain, *Appling v. Odom, supra*.

To which Class a given Contract for Farming on Shares belongs —How Determined.

Such are the three classes of contracts for farming on shares; but there is no general rule prescribing particular technical expressions which shall distinguish the class to which any given contract belongs, and in view of the different relations created by the different classes of contract, it often becomes a matter of some importance to determine the head under which it falls. The rule laid down is that the intention of the parties to the contract must govern, *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Id. 372; *Lewis v. Lyman*, 22 Pick. 437; *Moulton v. Robinson*, 27 N. H. 550; and the intention may be inferred from the circumstances of the case, *Alwood v. Ruckman, supra*; and in *Armstrong v. Bicknell*, 2 Lans. 216, the Court seems to have allowed the acts of the parties to have weight in determining the character of the contract.

Length of Letting as Bearing on Character of Contract.

While, as we have said, there is no general rule for determining the character of the letting, yet there are certain provisions which have been held by the courts, although there is a lack of uniformity in the decisions, to indicate the intention of the parties. It has been held in New York from quite an early time that where the letting is for the purpose of making a single crop, or for one year only, that the contract will be held to be such a one as will preclude the existence of the relation of landlord and tenant, and will give rise to a tenancy in common of the crops, *Foote v. Colvin*, 3 Johns. 216; *Bradish v. Schenk*, 8 Id. 151; *De Mott v. Hagerman*, 8 Cow. 220; *Putnam v. Wise*, 1 Hill 235; *Tanner v. Hills*, 44 Barb. 428; *Dinehart v. Wilson*, 15 Id. 595; *Fobes v. Shattuck*, 22 Id. 568; *Armstrong v. Bicknell*, 2 Lans. 216; *Caswell v. Districh*, 15 Wend. 379; and this shortness of term has been allowed to overcome the effect even of such formal words as "by these presents to lease and to farm let," even when combined with a covenant on the part of the occupier "to pay" a proportion as rent, *Putnam v. Wise, supra*. In *Taylor v. Bradley*, 4 Abb. App. 363, this position was recognized as settled by authority, although WOODRUFF, J., seemed to question the reason-

ableness of the time or crop test. In *Heiskell v. Bushnell*, 37 Conn. 36, LOOMIS, J., considered the contract for a single crop as generally implying a case of mere payment to the cultivator by means of a portion of the crop raised; in New Hampshire, *Putnam v. Wise* is apparently followed in *Brown v. Lincoln*, 47 N. H. 468; and in *Ponder v. Rhea*, 32 Ark. 435, it was held that where there is a letting on shares for a single crop, and there is no evidence of intent that the relation of landlord and tenant should exist, the relation of the parties will be that of tenants in common, although the share of the landowner is called rent; but, on the other hand, the length of time of the farming on shares is declared immaterial in *Moulton v. Robinson*, 27 N. H. 550; and it is held that the relation of landlord and tenant may arise in the case of a letting for a single year where the intent is otherwise shown; thus, in *Frout v. Hardin*, 56 Ind. 165, where there was a lease for a year to raise a crop, the owner to receive as rent one-half the corn in standing rows, it was held that the relation of landlord and tenant existed, and that the exclusive possession was in the tenant as against the landlord until division of the crop was made. In *Hoskins v. Rhodes*, 1 G. & J. 266, a contract to sow a field with grain, and give to the lessor "one-third of all grain raised *as rent*," was held to create the relation of landlord and tenant; and see *Burns v. Cooper*, 31 Pa. St. 426; and *Alwood v. Ruckman*, 21 Ill. 200, in which CATRON, C. J., stated generally: "But there may be a leasing from year to year, or for a single year, where the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop; in which case the parties are not tenants in common of the crop." See also *Dixon v. Nicolls*, 39 Ill. 372; *Ross v. Swaringer*, 9 Ired. Law 481; *Walls v. Preston*, 25 Cal. 59.

Provision in Contract with Reference to Possession of Land.

According to some authorities the test is found in the answer to the question, Does the contract provide that the possession of the premises to be cultivated shall be given to cultivator? Thus in *Alwood v. Ruckman*, *supra*, CATRON, C. J., said: "In general the question of possession will determine the matter. Take this case, where the tenant moves on to the farm and occupies and controls it exclusively, as if it were his for the time being, and is by the agreement so to occupy it for the year, it would be deemed to be in his exclusive possession, and it would be held to be a lease of the farm for the year, though the rent was to be paid in a part of the crops, the amount of which was to be determined by the amount of the crops raised, when the tenant would be held to be the exclusive owner of the crop until the stipulated rent was set off to the landlord. On the other hand, in a case where the owner of the farm resided upon it, and

continued to exercise control over it as the owner, and allows another to cultivate a crop upon a part or even upon the whole of it, and is to receive a portion of the crop as his compensation for the use of the land, we should not presume a tenancy, nor hold the person who cultivated it to be in exclusive possession of the portion which he cultivates, and the parties would be tenants in common of the crop." And in *Walls v. Preston*, 25 Cal. 59, RHODES, J., in the course of the opinion of the Court, said: "It cannot be maintained upon those authorities, and certainly not upon principle, that a lease in the usual form of a demise for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provision for a division of some portion or all the crops that may be raised;" and see *Dixon v. Niccolls*, *supra*. An exclusive possession has been inferred from the fact that the occupier is "to pay over" a certain portion of the crop, *Wentworth v. Portsmouth and Dover R. R.*, 55 N. H. 540, and in the same case it was held that the reservation by the landlord of the exclusive possession of a part of the demised premises did not necessarily imply that the possession of the rest of the land was to be in common. In *Brown v. Lincoln*, 47 N. H. 468, however, where the occupier was "to give" to the owner one-half the crops, the contract was held to be one creating a tenancy in common. In *Symonds v. Hall*, 37 Me. 354, a provision that the occupier "shall have the use and benefit" of the land, was held to create a tenancy in common. The New York cases, at least those in which the contract is for a crop or a year, do not recognize possession as a test of the character of the contract. See cases cited on p. 235.

The non-residence on the premises of the landowner is of weight in determining the contract to be one giving rise to the relation of landlord and tenant, *Dixon v. Niccolls*, 39 Ill. 372.

In *Alwood v. Ruckman*, 21 Ill. 200, the rule is laid down that where it is doubtful whether the contract gives the possession and control of the premises absolutely and exclusively to the tenant, or jointly to the owner of the land and the cultivator of the crop, and whether by its terms the right of entry continues only for the time specified in the contract, or lasts until the crop is removed, the inclination of the courts should always be in favor of the latter of each pair of conclusions.

Reservation of Rent.

The reservation of a portion of the produce as rent *eo nomine*, or a stipulation that the occupier shall give a proportion of the same as rent, has

been held to determine the character of the contract to be that of landlord and tenant, *Williams v. Cleaver*, 4 Houst. 453; *Hoskins v. Rhodes*, 1 G. & J. 266; *Harrison v. Ricks*, 71 N. C. 7; so where the terms of the contract are that the occupier is "to deliver" a proportion of the crop raised, *Townsend v. Isenberger*, 45 Iowa 670; *Blake v. Coats*, 3 G. Greene 548; *Rees v. Baker*, 4 Id. 461; *Merrit v. Fisher*, 19 Iowa 354; and see *Burns v. Cooper*, 31 Pa. St. 426; but there are cases which hold that even when the undertaking on the part of the cultivator is to deliver a share of the proceeds, and the usual words of letting are used, the parties will be held to be tenants in common of the crops, *Smyth v. Tankersley*, 20 Ala. 212; *Williams v. Nolen*, 34 Id. 167; *Hurd v. Darling*, 14 Vt. 214; *Scott v. Ramsey*, 82 Ind. 330; and even where a proportion of the product is to be given to a party to a contract by the name of rent, and the reversion is not vested in said person, the product to be delivered will not be considered as a rent. This was decided in *Lowe v. Miller*, 3 Gratt. 205, where Z. owning certain land allowed J. for his own benefit to make a grant to W. of certain land, which W. was to cultivate and deliver a certain proportion of the products thereof to J., it was held that J. and W. did not become landlord and tenant, "inasmuch as the rendering one-half the crop was not incident to the reversion, and consequently gave no right of distress," but that the whole transaction was a contract with Z.'s license, which rendered W. and J. tenants in common of the crop.

Provision that Occupier shall Pay the Taxes on the Land.

A provision in a contract for farming on shares that the occupier shall pay the taxes, is held to show an intention to create the relation of landlord and tenant, *Steel v. Frick*, 56 Pa. St. 172.

Contract by Landlord to Furnish Seed or Agricultural Implements.

The fact that the landlord is by the terms of the contract to furnish all or a portion of the seed from which the crop is to be raised, or implements for cultivation, has been allowed weight and held to show that the intent of the parties was to create a tenancy in common of the crops, *Currey v. Davis*, 1 Houst. 598; and see *Moore v. Spruill*, 13 Ired. Law 344; *Brown v. Coats*, 56 Ala. 439; *Heiskell v. Bushnell*, 37 Conn. 36; *Creel v. Kirkham*, 47 Ill. 344; *Bernal v. Horious*, 17 Cal. 541; but in *Hatchell v. Kimbrough*, 4 Jones Law 163, where the defendant rented a house and plantation for a year to the plaintiff and undertook to furnish him with a horse, and it was agreed

that the crop should be divided, the Court held that the relation of landlord and tenant existed, and that the circumstance that the lessor "furnished plaintiff with a horse, had no other effect than to entitle him to a larger part of the crop as rent," and see *Johnson v. Hoffman*, 53 Mo. 504.

Land to be Occupied not Identified.

If the land to be occupied by the cultivator is not identified, the relation of landlord and tenant will not arise; it was so held in *Haywood v. Rogers*, 73 N. C. 320, where the contract was that the defendant "might tend so much of plaintiff's land as he could cultivate with one horse during the year 1871."

Reservation of Property in Crop to Landlord.

In some contracts the property in the crop to be raised is reserved to the landowner until the rent is paid, or until advances made by him are reimbursed. The natural effect of such a provision would seem to be to render the occupier a cropper, and it has been so held by the Supreme Court of North Carolina, *Haywood v. Rogers*, 73 N. C. 320; and the same court has gone so far as to declare that a stipulation for a lien must be either void or constitute the occupier a cropper, *Harrison v. Rick*, 71 N. C. 7; *State v. Burnell*, 64 Id. 661; and in *Ross v. Swaringer*, 9 Ired. Law 481, the provision was that the title to the whole crop should be in the landowner, one half for rent and the other half until he was paid the amount due for provisions furnished by him, and on account of an old judgment held by him, the Court held that the title to the crop was in the occupier, and that the relation of landlord and tenant existed, the landlord not having even a lien.

By statute in North Carolina, Bat. Rev., Ch. 64, § 13, where the lessee or occupier agrees in writing to pay the lessor a part of the crop, or to give a lien thereon for rent, the possession of the crop is deemed to be in the lessor, *Varner v. Spencer*, 72 N. C. 381; the same is the rule by the Act of 1876-77, Ch. 283, § 1, irrespective of the contract being in writing; but a distinction is taken between the constructive statutory possession and actual possession of the crop. This distinction is implied in the act itself, see § 2, and in *The State v. Copeland*, 86 N. C. 691, the Court held that the act contemplated the actual possession remaining in the occupier until division, and that, therefore, he could not be guilty of larceny if he appropriated the crop to his own use, even if with felonious intent.

Provision that Landlord shall Sell Crop.

The fact that by the contract the landowner is to sell the crop and give to the occupier the value of his share thereof will not, *per se*, prevent the relation of the parties from being a tenancy in common. Thus in *Moore v. Spruill*, 13 Ired. Law 55, by the terms of the contract, K. was to cultivate S.'s land, furnishing the means therefor so far as he was able, the rest of the means to be furnished by S. S. was to sell the crop, and out of the proceeds reimburse himself for his outlay, and after deducting the value of one-third of the crop give the remainder to K. It was held the contract was neither a lease nor a hiring, but created a tenancy in common.

Agreement to Give Occupier Share of Crop.

It would seem that the general rule would be, that where a landowner agrees that another should work on his farm and raise a crop and receive a proportion of the crop as compensation, that the relation created would be that of hiring for wages in kind, *Chase v. M'Donnell*, 24 Ill. 236; *Maverick v. Lewis*, 3 McCord 211; but it is held in Alabama that a contract to give laborers a portion of the crop raised and to feed them as a compensation for their services will render the laborers tenants in common of the crop with the employer, *Smyth v. Rice*, 56 Ala. 418; *Smyth v. Tankersley*, 20 Id. 212; *Thompson v. Mawhinney*, 17 Id. 362; *Strother v. Butler*, Id. 733; *Williams v. Nolen*, 34 Id. 167.

An agreement in the following form, "G. agrees to work the dairy and land of C. on the following terms," viz.: that G. should deliver to C. 9600 pounds of cheese, and one-half the crop, and G. to own "the rest of the cheese and butter," was held to create a tenancy in common, *Wilber v. Sisson*, 53 Barb. 258; and the Court went rather farther than required by the exigencies of the case, and held generally that where the owner agrees to pay the occupant for working a farm on shares a portion of the crop, a tenancy in common of the crop would be created.

Agreement to Use Fodder or Manure on the Land.

Many agreements to farm on shares contain provisions that the fodder raised shall be fed to the stock upon the premises or that the manure made on the land shall be used thereon; the effect of such or similar provisions, whether in a contract which constitutes a lease or in one which creates a tenancy in common, is to qualify the right of property in the occupier as to the manure or fodder, so that he cannot sell it from the land, *Lewis v.*

Lyman, 22 Pick. 437; or carry it away, *Brown v. Burrington*, 36 Vt. 40; or by means of a mortgage put it in the power of a creditor to acquire such title thereto as will permit him to remove it, *Jewell v. Woodman*, 59 N. H. 520; and it cannot be subjected to execution for his debts, *Id.*; *Potter v. Cunningham*, 34 Me. 192; *Hatch v. Hart*, 40 N. H. 93; but the right is simply to use the fodder or manure in one particular way for the benefit of both parties, *Moulton v. Robinson*, 27 N. H. 550.

Occupier not an Insurer of Crop against Loss. Liable only for Crop already Raised.

It is to be noted that under any form of letting upon shares the tenant is not to be held as an insurer against the loss of the crop when made; he is bound to exercise only ordinary care in gathering the crop, *Brown v. Owen*, 94 Ind. 31; and the portion of the crop for which the occupier can be held responsible is only the agreed proportion of the crop which is actually raised irrespective of the method of cultivation or of the question whether the occupier has farmed in a proper and skilful manner or not. This doctrine was upheld by the Supreme Court of Arkansas in *Patton v. Garrett*, 37 Ark. 605; in which case EAKIN, J., said: "It would give rise to interminable litigation if landlords leasing on shares could claim all that would have inured to their benefit if the tenant had exercised ordinary industry and judgment in the cultivation of the crops. The amicable adjustment of rent would be almost exceptional. The landlord chooses his tenant, and must judge of his skill and fidelity in husbandry; or, if he desires assurance on these points, should make special stipulations or have money rent secured."

Contract may Insure to Landowner Return in Value of what He Puts on Land.

A contract for farming on shares, which provides that stock or implements shall be furnished by the landowner, may be so drawn as to insure him the return in value of what he puts on the farm, irrespective of the success of the venture; thus, in *Smalley v. Corliss*, 37 Vt. 486, there was a contract to farm one year on shares, the landlord to receive one-half the gross proceeds "and to have as much property and value in hay, seed, teams, stock, and tools returned to said Smalley, the landowner, at the expiration of the contract as he puts on said farm and delivers over to said Corliss." It was argued that the stipulation was one so unusual in contracts of farming on shares that the language should not be held to constitute an insurance by the occupier, but should be taken to mean only that in case of

any loss or depreciation of the property furnished by the landowner, the burden of proving that it took place without his fault should be put upon the occupier; but POLAND, C. J., in delivering the opinion of the Court, said: "It appears to us that the language of the contract is so clear and distinct, and so entirely unequivocal in its meaning, that no room is afforded for a construction any more favorable to the defendant than that he bound himself to return the property he received, or its equivalent in value, though the loss or depreciation was wholly without fault of his."

Statute of Frauds—Effect of on Contract of Farming on Shares.

The contract of farming on shares, at least such a one as would fall within either of the first two classes noted above, is a contract concerning lands within the Statute of Frauds, *Moore v. Ross*, 11 N. H. 547; *Williams v. Bemis*, 108 Mass. 91; but if such a contract is made by parol, it is not altogether void, and if the contract is performed on the part of the landowner and the cultivator takes the entire crop to himself, the former can maintain an action to recover his stipulated share, *Moore v. Ross, supra*; and in *Hobbs v. Wetherwax*, 38 How. Pr. 385, while the Court did not pass upon the question of the validity of a parol letting on shares, it held that the landowner could not treat the contract as valid in part and invalid in part, and after harvest of the other crops revoke the contract so far as concerned the grass; and in *Williams v. Bemis*, 108 Mass. 91, where there was a parol agreement to farm on shares for two years, and it was understood that the crop would be larger the second than the first year, and at the end of the first year the owner refused to allow the cultivator to continue during the second year, but paid him his share of the first year's crop, it was held that the cultivator could recover for materials furnished during the first year, AMES, J., saying: "The plaintiff must be considered as having in that way [*i. e.* preparing the land] paid in advance, in part at least, for the privilege of using the land the second year in the manner agreed upon. By the repudiation of the contract he has lost the privilege which he had paid for."

Rights of Occupier Lost by Abandoning Premises.

If a cultivator on shares by a parol contract abandon possession and abscond he is held to have no interest left in the crop, for if the contract be considered as one for services, he has no right to compensation, because the contract is an entire one and has not been fulfilled; if as one creating a tenancy, he has by his own action determined his will, *Chandler v. Thurston*, 10 Pick. 205.

Right of Possession under the Contract of Farming on Shares not Assignable.

While, as we have seen, a lessee, if not restrained by his lease, may assign or sublet his term of years, under ordinary circumstances, it would seem that an occupier of land under an agreement to farm on shares could not assign his interest in the contract so as to introduce another person upon the premises and permit him to raise the crop. The reasons for this are manifest. When a landowner leases his land for a money rent, fixed and certain in amount, he can be well supposed to have that rent in view as his compensation, irrespective of the character or ability of his tenant; his land may not be well farmed; he may have an idle, shiftless fellow for a tenant, but so long as the tenant does not commit waste (and for that a remedy exists), if the landlord get his money rent, he is not harmed, and the assignment leaves the original tenant still liable for the rent; but in a case of farming on shares, the character of the occupier is the very moving cause of the contract. If the landlord obtain as his coadventurer a competent, honest, and industrious farmer, he gets a good rent; if he have upon his land an incompetent, dishonest, and idle man, he gets little or nothing. If, then, it should be permissible on the part of the occupier to assign his right to possession, it is readily seen what a great injury might at any time be worked to the landowner by the act of the occupier in making an assignment. For as his rent is entirely dependent on the product of the land, he might receive nothing through the assignee's incompetency, and the assignor would be only liable for what was actually raised, viz., nothing. That the lessee's rights in a lease on shares cannot be assigned has been decided in *Randall v. Chubb*, 46 Mich. 311. In that case, it is true, the lease provided that the lessee should have the use of certain implements, but the reasoning will apply as well in support of the more general statement made above.

Vendee in Possession under Contract of Purchase.

SMITH v. STEWART.

Supreme Court of Judicature of New York, May Term, 1810.

[Reported in 6 Johnson 46.]

Where there is a contract for the purchase of land under which the purchaser enters into possession, but afterwards refuses to complete the purchase; the vendor cannot maintain an action of *assumpsit* against him for *use and occupation*, but must resort to an action of trespass and ejectment, to recover the *mesne profits*.

THIS was an action, for the *use and occupation* of 50 acres of land, in Kingsbury. The cause was tried at the Washington circuit, in June, 1809, before Mr. Ch. J. KENT.

At the trial, Zina Hitchcock, the only witness for the plaintiff, testified, that he was the agent of Joseph Smith, the owner of the land, who resided in England, and father of the plaintiff; about 14 years ago, the defendant applied to the witness to purchase the land, and was informed that Joseph Smith was dead; but the witness agreed to sell the land to the defendant at 5 dollars per acre, and to give him a deed as soon as he should receive a power of attorney from the plaintiff; and the defendant, with the consent of the witness, took possession of the land, and has continued in possession ever since. At the time of the agreement for the purchase, the land was uncultivated; but has since been improved, and rendered more valuable. The witness received a power from the plaintiff, and offered to the defendant to execute a deed; and the defendant, from time to time, promised to pay the money, until the autumn of 1808, when he refused.

The Chief-Justice inquired of the plaintiff's counsel, whether he could show any other agreement between the parties, except that for the purchase of the land; and being answered in the negative, he nonsuited the plaintiff.

A motion was made to set aside the nonsuit.

Weston, for the plaintiff.—By the 31st section of the act concerning distresses, and for the better and more easy recovery of rents, etc. (11 sess. c. 36) it is enacted that landlords, or their heirs or assigns, where the agreement is not by deed, may recover a reasonable satisfaction for lands, etc., held or occupied, in an action on the case, for the use and occupation, and if on the trial, a *parol* demise, or any agreement for a rent certain, should appear, the plaintiff is not to be nonsuited, but the demise or agreement is to be used as evidence of the *quantum* of damages.

The statute was made not only to prevent landlords from being surprised, by the tenant's setting up a *parol* demise or agreement; but also to enable the plaintiff to recover for the use and occupation.* The statute meant to give an action to recover a reasonable satisfaction for the use and occupation, where there was no express promise to pay rent.†

The action of *assumpsit* for use and occupation, is founded on an implied, as well as an express promise. Wherever a tenant uses or enjoys premises, by permission of the owner, he is liable to an action on a *quantum meruit*.‡

Foot and Russel, contra.—The law does not raise an implied promise where there is an express agreement. Here was an express agreement to purchase the land. It is true the agreement was by *parol*, and being executed in part, by taking possession, it could be enforced in chancery. It was a valid contract.§ The defendant, if he discovered, after he had entered into possession, that the plaintiff had not a good title, might well refuse to perform the agreement; and the plaintiff, if he wishes to enforce it, should resort to a court of equity. If the plaintiff should recover in this action, the real owner of the land, if the title is in another, might bring an action of ejectment against the defendant, and recover the *mesne profits*. The statute clearly contemplates the relation of landlord and tenant, and cannot apply where that relation does not exist.

Where a person enters upon land under a contract for the purchase, it is not as tenant, but *quasi* owner.

* 2 Wils. Rep. 214.

† 2 Hen. Black. 323. 1 Comyns' Dig. 183. (Assump. A. 1.)

‡ 2 Comyn on Contracts, 510, 511.

§ 1 Comyn on Contracts, 80, 81.

Weston, in reply.—If the plaintiff had brought an action of trespass against the defendant, he could have protected himself by his contract. What remedy, then, has the plaintiff, after the refusal of the defendant, to fulfil the contract, but an action for the use and occupation? Because he may have a remedy in equity, it is no reason why he may not also have a remedy at law. The defendant might, if he thought proper, have resorted to a court of equity, as well as the plaintiff.

If the plaintiff should bring an action of ejectment, he could recover the *mesne profits* only from the time when the possession became *tortious*, not under the contract; and suppose the defendant had quitted the premises before an action of ejectment was brought, what remedy would the plaintiff then have?

In *Elliot v. Rogers*,* it was held, that where there was an agreement by deed to demise, but not amounting to an actual lease, under which the party entered, the owner might maintain *assumpsit* for the use and occupation. In the case of *Hearne and Tomkins*,† there was a contract for a purchase, under which the defendant entered into the possession, supposing the plaintiff had a long term; but discovering afterwards that the plaintiff had an interest only for three years, he refused to complete the purchase, and was put to considerable expense while in possession; it was not pretended that an action would not lie for the use and occupation; but Lord Kenyon nonsuited the plaintiff, merely because the occupation, instead of being beneficial to the defendant, had been injurious.

PER CURIAM.—At common law, no action of *assumpsit* for rent would lie, except upon an express promise, made at the time of the demise. (*Johnson v. May*, 3 Lev. 150. Bull. N. P. 138.) The present action is given by the stat. of 11 Geo. II., c. 19, § 14, which we have adopted. (Laws, vol. I., 146.) But this statute, from the terms of it, seems to apply only to the case of a *demise*, and where there exists the relation of *landlord* and *tenant*, founded on some *agreement* creating that relation. So are the precedents. (2 H. Black. 319.) Here the defendant did not enter under such a relation, but under a contract for a deed. He, therefore, entered under a color of title which might have been enforced in equity. He finally refused to perform the con-

* 4 Esp. Rep. 59.

† Peake's N. P. Rep. 192.

tract, and changed himself into a trespasser; and the better opinion is, notwithstanding the case of *Hearn and Tomlin*, (Peake's N. P. 192,) that he never was strictly a tenant, and never entitled to notice to quit, nor liable to distress, or to an action of *assumpsit* for rent. He is liable in another way, to be turned out, as a trespasser, and is responsible, in that character, for the *mesne* profits. The motion to set aside the nonsuit is therefore denied.

Judgment of nonsuit.

THOMAS GOULD v. SAMUEL THOMPSON.

Supreme Judicial Court of Massachusetts, Boston, March Term, 1842.

[Reported in 4 Metcalf 224.]

A. made an oral agreement for the purchase of B.'s house, advanced the purchase-money, and took possession: before A. obtained a deed, the house was destroyed by fire, and he thereupon vacated possession of the ground, refused to accept a deed which B. tendered him immediately after the fire, and commenced a suit against B. in which he recovered back the purchase-money. *Held*, that A., during his occupation of the house, was tenant at will, and that he was liable to B. in an action of *assumpsit* for use and occupation. *Held also*, that A., by refusing to accept a deed from B., determined the tenancy at will, and was no longer liable to him for use and occupation.

ASSUMPSIT on an account annexed to the writ, in which the plaintiff charged the defendant, as debtor for 11½th quarters of rent of an estate on Salem street, Boston—\$887.50.

The following facts appeared in evidence, or were admitted at the trial: On the 8th of May, 1835, the plaintiff (who owned a house and lot on Salem street) and the defendant made an oral agreement for the sale of said house and lot to the defendant for \$3700. The premises were under a mortgage, and the plaintiff agreed to remove it, and to give the defendant an unincumbered title. On the 14th and 16th of May, the defendant paid the plaintiff \$3700. In the forenoon of the 18th of May, the plaintiff paid off the mortgage, and in the afternoon of the same day, before the plaintiff had offered to the defendant a deed

of the estate, the house was entirely destroyed by fire. The plaintiff afterwards, on the same day, offered a deed to the defendant, who refused to take it—alleging that the plaintiff could not then convey the property contracted for. On the 13th of June, 1835, the defendant commenced an action against the plaintiff, to recover back the purchase-money which he had paid for the house; and after trial, he recovered judgment, in this court, at March Term, 1838. (See 20 Pick. 134.)

On the 14th of May, 1835, after the defendant had paid part of the purchase-money, he went into the house, and superintended some repairs thereof; and on the 18th of the same May, he removed his furniture, etc., into the house, and had just completed such removal when the fire took place.

On the 4th of May, 1838, the plaintiff went upon the lot, and declared, in the presence of two witnesses, that he took possession of it. This, however, was not known by the defendant; and the occupation of the lot was of no value, till another building was erected thereon.

Immediately after the fire, a controversy arose between the plaintiff and defendant on the question who should bear the loss. It did not appear in evidence that either of them exercised any act of ownership or possession of the lot, after the fire, till after the decision of the defendant's aforesaid suit against the plaintiff, for the recovery of the purchase-money.

The jury were instructed that they "must decide whether the relation of landlord and tenant ever existed between the parties after the fire, and that if they found that such relation existed, they should give their verdict for the plaintiff for such sum as the use of the tenement was worth to him, and that the measure of damages was not what it was worth to the defendant: That although the defendant took possession of the tenement, on a contract of purchase and sale, yet as that contract was rescinded by the fire, the defendant became tenant, from his entry, and as such was liable to pay the rent: That as the defendant had possession of the house from the 14th to the 18th of May, and was in by the plaintiff's consent, and removed his goods into the house on the 18th, he was the plaintiff's tenant: That the relation of landlord and tenant existed between them, at least from the 14th to the 18th of May."

The defendant requested the judge to charge the jury, "that if a tenant hold a house, which is in good order, either as tenant at will or sufferance, and if the house, by fire, or other cause, for which the ten-

ant is not responsible, be totally destroyed, or rendered untenable, and the owner have knowledge of it, then the tenant would be discharged from liability to pay rent thereafter: And also to charge, that if one take possession of a house, on a contract of purchase, which afterwards cannot be completed, because of defect of title, he cannot be charged on an implied assumpsit for use and occupation." The judge declined so to charge.

The jury returned a verdict for the plaintiff for \$308. Whereupon the judge requested them to find specially what was the value of the use of the house, from the time the defendant took possession of it till it was destroyed by fire; and they found it to be four dollars.

The defendant moved for a new trial: 1st, for the misdirection of the judge, and for his refusal to direct as requested. 2d. Because, if the defendant, on the evidence, was liable for rent at all, the verdict could not be sustained for more than the four dollars.

Peabody, for the defendant.—The relation of landlord and tenant did not exist after the fire, and the jury should have been so instructed. It was a question of law, which should not have been submitted to them.

The true rule of damages was not the worth to the plaintiff, as was stated to the jury; but the benefit received by the defendant from the occupation. *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 270. *Hearn v. Tomlin*, Peake's Cas. 192. *Edwards v. Etherington*, Ry. & Mood. 269. If a tenant receives no benefit, the landlord is entitled to no pay. *Salisbury v. Marshal*, 4 Car. & P. 65. *Richardson v. Hall*, 1 Brod. & Bing. 54. 3 Kent Com. (3d ed.) 464. 3 Stark. Ev. 1520. *How v. Kennett*, 3 Adolph. & Ellis 659.

The plaintiff cannot recover even the four days' rent. Where one enters under a contract of sale which is not executed, assumpsit for use and occupation will not lie. *Smith v. Stewart*, 6 Johns. 46. *Bancroft v. Wardwell*, 13 Johns. 489. *Kirtland v. Pounsett*, 2 Taunt. 145. *Keating v. Bulkely*, 2 Stark. R. 419. 3 Stark. Ev. 1517, 1519. *City of Boston v. Binney*, 11 Pick. 1. 1 U. S. Digest, Assumpsit, 131.

S. D. Parker, for the plaintiff.—The action for the defendant's occupancy for four days is well maintained, as he was a tenant at will, or at sufferance, and not a trespasser. 4 Kent Com. (3d ed.) 114. *Keay v.*

Goodwin, 16 Mass. 4. *Doe v. Lawder*, 1 Stark. R. 308. *Right v. Beard*, 13 East 210. *Jackson v. Bradt*, 2 Caines 174. *Doe v. Miller*, 5 Car. & P. 595. *Doe v. Jackson*, 1 Barn. & Cres. 455. The decisions cited from 2 Taunt. and from 6 & 13 Johns. do not apply to this case, as they turned on the St. 11 Geo. II. c. 19, which was never in force in this Commonwealth.

The fire did not change the relation of the parties, and nothing was afterwards done to terminate the defendant's tenancy. He therefore continued liable to pay rent. *Cruise's Digest*, Tit. 9, c. 1, §§ 16–21. *Fowler v. Bott*, 6 Mass. 63. *Belfour v. Weston* and *Doe v. Sandham*, 1 T. R. 310, 705. *Holtzapffel v. Baker*, 18 Ves. 115; 4 Taunt. 45. *Hare v. Groves*, 3 Anst. 687. *Izon v. Gorton*, 7 Scott 537. S. C. 5 Bing. N. R. 501.

Peabody, in reply.—In the cases cited, where it was held that rent was recoverable after the destruction of the tenement, there was either a covenant to pay rent, or the defendant was tenant for years. They are therefore not applicable to a tenant at will or at sufferance.

SHAW, C. J.—Although in form this is indebitatus assumpsit on an account annexed, yet the charges in the account are for rent; and there being no lease, the only ground on which it can be sustained is that of a *quantum meruit* for use and occupation, to recover a reasonable satisfaction for the use of the premises. Whether the St. of 11 Geo. II. c. 19, giving an action of assumpsit for use and occupation, is in force in this Commonwealth, as statute law, we think it unnecessary to decide; the Court being of opinion, that by a long course of practice, which must now be considered as the common law of the State, that action may be maintained for rent not reserved by deed. *Codman v. Jenkins*, 14 Mass. 93.

Several cases were cited to prove that assumpsit would not lie for use and occupation, where the purchaser had entered under a parol contract of sale which had failed. In *Kirtland v. Pounsett*, 2 Taunt. 145, it was argued by counsel, that there was no demise, express or implied, arising from such use of premises agreed to be sold, and of which the vendee takes possession under permission of the vendor. The cause, however, was not decided on that ground, but on the ground, that the use of the purchase-money, which had been advanced, was intended

and must be presumed to be a compensation for the use and enjoyment of the premises. But in the subsequent case of *Hull v. Vaughan*, 6 Price 157, where the foregoing case was reviewed, it was decided, on great consideration, overruling the direction of the judge at Nisi Prius, that where the relation of landlord subsisted by any contract, express, or implied by law, the action of assumpsit for use and occupation would lie; and that such contract would be implied from the actual occupation and enjoyment of the premises, by permission of the owner, or other person having the power of disposal, when such use and occupation had been beneficial.

The case of *Boston v. Binney*, 11 Pick. 1, implies that assumpsit for use and occupation will lie, where one holds lands beneficially, by the permission of the owner. It did not lie in that case, because the defendant, during all the time for which the rent was demanded in the action, held adversely to the title of the plaintiffs.

In the present case, it appears that the defendant entered into a parol agreement to purchase the house and lot of the plaintiff, of which the house constituted the chief value; that the defendant paid the amount of the agreed purchase-money in advance; that by permission of the vendor, the purchaser entered and took possession; but that in about four days, and before the contract was executed by the delivery of the deed, the house was destroyed by fire. Upon an action brought to recover back the purchase-money, this Court held, that as no deed had been given at the time of the fire, the house was at the risk of the vendor; that the loss was his loss; that the purchaser was not bound to accept a deed of the land only, after the destruction of the house; and that he had a right to recover the purchase-money, as money paid on a consideration which had failed. *Thompson v. Gould*, 20 Pick. 134. Then the question arises, upon these facts, whether the purchaser was, at any time, and if so, for what term of time, the tenant of the vendor and owner. And the Court are of opinion, that when the defendant thus entered, he became tenant at will of the owner.

When one enters on land, to use and occupy it, with the consent and permission of the owner, but for no definite time, he is tenant at will. Where, at common law, one makes a feoffment and delivers the deed, without livery of seizin, the feoffee is tenant at will. Co. Lit. 56 b. In the case at bar, the possession was given under an expectation that a deed would be given; but it was uncertain whether a deed would

ever be given. In fact, in consequence of an unforeseen event, none ever was or could be given; and therefore the purchaser, in the meantime, was the tenant at will of the owner. Had the deed in fact been given, pursuant to the parol agreement, then the tenancy at will would be considered as merged in the executed contract, which, by its terms, would relate back to the time that possession was given under that agreement.

The next material question is, when this tenancy at will terminated.

The purpose for which the defendant entered was, to use and occupy the estate, temporarily, until the title could be completed, and then permanently. But by the destruction of the building, that purpose was wholly defeated, as it was afterwards adjudged. The tenement became useless to him, and he immediately vacated the possession of it. He refused to accept a deed when tendered to him, by the owner, which was notice to the owner that he no longer intended to take the title, in the expectation of completing which, he had entered; and he shortly after brought his action to recover back the purchase-money. This appears to us decisive evidence of the determination of his will at the time of the fire, and notice thereof to the owner, and that the tenancy at will cannot be extended beyond that time.

The plaintiff therefore is entitled to judgment for the four days' rent found by the jury.*

The question of the status of a vendee, who enters into the possession of realty under an agreement to purchase the same, during the interval between his entry and the final consummation or failure of the contract to purchase is one of considerable interest, and has received considerable attention from the various courts. The subject naturally divides itself into three heads, and the cases may be grouped under them as follows:

I. Where the vendee enters under a contract upon his side to purchase the land, and on the side of the vendor to make title to the same, and the contract is subsequently consummated.

II. Where the vendee having entered under such circumstances the contract fails through the refusal of the vendee to comply with its terms, or otherwise through his fault.

III. Where the contract fails through the fault of the vendor.

* See *Howard v. Shaw*, 8 Mees. & Welsb. 118. *Packer v. Gibbins*, 1 Adolph & Ellis, N. R. 421.

We will consider these in their order, and we may premise that there has been considerable discussion as to how far a vendee in possession is to be considered a tenant at will, and that there is by no means unanimity of opinion upon the subject.

Status of Vendee in Possession whose Title is Afterwards Perfected.

First, then, as to the vendee whose title is afterwards perfected. It may be stated as settled that, where the title is afterwards made perfect, the vendee will not be regarded as having been during the interval between that time and his entry a tenant at will, at least so far as to render him liable to an action for the use and occupation of the premises in the absence of an express agreement to pay rent, *Carpenter v. United States*, 17 Wall. 489; *Dennett v. Penobscot Fair Ground Co.*, 57 Me. 425. In the former of these cases the officers of the Federal government had, in 1863, taken possession of certain land of the plaintiff under a contract to purchase the same on behalf of the United States. No appropriation was made for such purchase, nor was the purchase authorized by Congress until 1866. Having in that year received the agreed price, the vendor subsequently brought suit against the United States in the Court of Claims to recover for the use and occupation of his land in the interval between 1863 and 1866; the Court of Claims held that the government was not during that time tenant at will, and that the plaintiff could not recover. In delivering the opinion of the Supreme Court affirming this decision, STRONG, J., said: "The understanding of the parties to the material thing; unless it was in their contemplation that compensation other than the price stipulated to be paid for the transfer of the title should be made, as Chief-Justice MANSFIELD said in *Kirtland v. Pounsett*,* a contract to pay rent cannot arise by implication of law.

"The plain common sense of the case is, that if the plaintiff was entitled to anything beyond what he has received it was to interest on the purchase-money from the time possession was taken until the price of the sale was paid."

Status of Vendee in Possession where Contract of Sale Fails through his Fault.

II. When we come to the second head of the subject we find a wide divergence in the opinions of the courts.

* 2 Taunt. 145.

The courts of Massachusetts from an early time have held that where the vendee is let into possession by the vendor under an agreement of sale, and afterwards fails to fulfil the terms of the contract, he will be regarded as a tenant at will, *Cheever v. Pearson*, 16 Peck. 266; *Gould v. Thompson*, 4 Metc. 224; *Howard v. Merriam*, 5 Cush. 563; *Proprietors of No. 6 v. McFarland*, 12 Mass. 325 (in this case leave to enter was said to be either a lease at will or a license); *Foley v. Wyeth*, 2 Allen 131; *Towne v. Butterfield*, 97 Mass. 105; and this same view has been taken in other States, see *Patterson v. Stoddard*, 47 Me. 355; *Dwight v. Cutler*, 3 Mich. 566; *Manchester v. Doddridge*, 3 Ind. 360; *Den ex d. Love v. Edmonston*, 1 Ired. Law 152; *Doe ex d. Carson v. Baker*, 4 Dev. 220; *Jones v. Jones*, 2 Rich. (So. Car.) 542. The same rule is held whether the contract to purchase, under which entry is made be parol or oral, *Doe ex d. Carson v. Baker*; *Gould v. Thompson*, *supra*, or a written one, *Howard v. Merriam*, *supra*, and where the vendee holds the vendor's bond to convey the title on compliance by the vendee with terms of the contract, *Proprietors of No. 6 v. McFarland*, *supra*.

In consequence of this doctrine, it is held that the vendee is liable to an action for use and occupation of the premises, *Patterson v. Stoddard*, 47 Me. 355; *Keay v. Goodwin*, 16 Mass. 4; *Gould v. Thompson*, *supra*; but not to trespass or ejectment, until the will has been properly determined, *Jones v. Jones*, 2 Rich. 542; that if, during the vendee's possession, a house upon the premises is burned down, the loss is that of the vendor, *Gould v. Thompson*, *supra*; that the vendee cannot maintain an action for injuries done to the reversion, *Foley v. Wyeth*, 2 Allen 131; that the vendee may determine his will by a refusal to accept a deed of the premises, *Gould v. Thompson*, *supra*; and that the vendor may determine his will by a subsequent written conveyance to a third person, *Howard v. Merriam*, 5 Cush. 563.

But even in Massachusetts, where the doctrine of tenancy by the vendee has been carried as far as anywhere else, it is to be noted that the vendee is not held to be a tenant in such sense as to be brought within the summary process of the landlord and tenant act, as for nonpayment of rent or failure to pay the price stipulated at the time fixed in the agreement. See *Dakin v. Allen*, 8 Cush. 33, in which case the defendant entered into possession of land, holding a bond of the vendor to make a deed therefor to him on payment of a note given by the defendant for the price of the land, the interest on said note to be paid semi-annually until the note was paid; SHAW, C. J., said: "If it be said that he was to pay rent in the form of interest on the note, the answer is that he was to pay a sum of money semi-annually, not for the use of his land, nor grounded on the estimated value of such use, but on forbearance of payment of a sum of money which he had contracted to pay

absolutely, and for which he gave his note. There is no appearance of any agreement that the defendant's right of possession was made dependent on the payment of interest, though it is highly probable that this was tacitly understood. But the statute providing for a summary process in case of the holding over of a tenant without right requires something more, and refers to the case of a lessee and an actual denial." This case was followed in *Dunham v. Townsend*, 110 Mass. 440.

It may also be noted that where, by the terms of contract under which the vendee enters, anything remains to be done by the vendor before he can demand possession, he cannot treat the vendee as tenant at will. Thus in *White v. Livingston*, 10 Cush. 259, the vendor gave his bond to convey certain realty on the payment on demand by the vendee of a certain note, with interest quarterly, and to allow the vendee possession of the premises in the meanwhile; it was held that this did not create a tenancy at will so long as the note was undemanded and the interest paid, and consequently that the giving by the vendor of a deed to a third person would not terminate the right of the vendee to possession.

In opposition to the doctrine above set out are the decisions of several of the States, and most prominently stands the course of decision in New York, as to which, although there is some appearance of fluctuation, yet the result may be said to be that in New York the vendee in possession who fails to complete his contract is not tenant at will. By the New York courts the mere agreement to sell is held not to be a license to enter, *Suffern v. Townsend*, 9 Johns. 35; *Ives v. Ives*, 13 Id. 235; *Jackson ex d. Church v. Miller*, 7 Cow. 747; and even where the tenant enters by permission of the vendor he is said not to be a tenant at will, *Smith v. Stewart*, 6 Johns. 46; and see *Wright v. Moore*, 21 Wend. 233; a statement to the contrary was made in *Whiteside v. Jackson ex d. Mumford*, 1 Wend. 418; but later cases have held that an executory contract to purchase, no fixed period of occupancy prior to obtaining the title being named and no provision for compensation in the nature of rent being made, is a mere license and not a lease at will, *Dolittle v. Eddy*, 7 Barb. 74; *Stone v. Sprague*, 20 Id. 509.

Accordingly we find that in New York the action of use and occupation will not lie against the vendee in possession who refuses to perform his contract; but if compensation be sought by the vendor for the occupation of his land, it must be recovered by him in an action of trespass for mesne profits, *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 Id. 489; and the vendee is held not entitled to the notice to quit, which the New York law accords tenants at will in general, *Jackson v. Kingsley*, 17 Johns. 158; *Jackson ex d. Shipley v. Moncrief*, 5 Wend. 26; *Jackson v. Bradt*,

2 Caines 169; *Jackson ex d. Church v. Miller*, 7 Cow. 747. The case of *Jackson ex d. Ostrander v. Rowan*, 9 Johns. 330, is contrary to the current of authority upon this point, and *Jackson ex d. Livingston v. Niven*, 10 Johns. 335, is apparently so; but in the last cited case there was a rent reserved, which took this case out of the general rule.

We may notice that the remarks of RAPALLO, J., in *Harris v. Frink*, 49 N. Y. 24, would seem to imply that the law of New York was that any vendee in possession, where the contract is not completed, is a tenant at will, and to discredit, to that extent, *Smith v. Stewart* and *Bancroft v. Wardwell*; but the case before the Court in *Harris v. Frink*, was one in which the failure was on the part of the vendor, and the point was the right of the vendee to emblements; and a further distinction may be found in the fact that the contract to convey was a void one; and the real reason of the decision of the Court in the case before it would seem to be found in the following words of the learned Judge; "The permission to occupy, unaccompanied by any contract of sale, would clearly create a tenancy at will (31 N. Y. 453; 2 Caines R. 174, and cases *supra*). The effect of the invalidity of the contract of sale is to reduce the right of the vendee to that of a mere license, and to enable the vendor to revoke the license at his pleasure. When he exercises that right, there is no injustice in placing him in the same position as if the contract of sale which he repudiates had not been made. The holding from the beginning was at his will, and the principle upon which emblements are allowed to a tenant at will would seem applicable to such a case."

In Missouri, the case of *Glasscock v. Robards*, 14 Mo. 350, is badly reported, but it seems to deny that there is any tenancy where the vendee fails to comply with his contract, and, in the syllabus, suggests that trespass for mesne profits is the vendor's remedy for the occupancy of his land; and the language of the Court in *Coffman v. Huck*, 19 Mo. 435, although that case was one in which the default was on the part of the vendor, is to the effect that by the entry of the vendee no tenancy arose.

In Alabama, the character of the possession of the vendee has been quite fully considered, and in *Tucker v. Adams*, 52 Ala. 254, the Supreme Court held that where the vendee had entered upon a contract of purchase and had failed to fulfil his part thereof, no relation of landlord and tenant existed. BRICKNELL, C. J., said: "The relation of landlord and tenant subsists by virtue of a contract express or implied. The relation of vendor and vendee is wholly different in its incidents and in the rights and liabilities of the parties. If the vendor has not parted with the legal title, and the vendee fails to pay the purchase-money, he has three remedies, all of which he may pursue at the same time, and cannot be compelled to elect between them. He

may maintain ejectment on his legal title, sue at law for the recovery of the purchase-money, and proceed in equity for the enforcement of his lien for the purchase-money, *Haley v. Bennett*, 5 Port. 452; *Duval v. M'Loskey*, 1 Ala. 708. If he has parted with the legal title, the vendee could not by possibility be his tenant. If he has not parted with the legal title, treating the vendee as his tenant liable for rent would operate a destruction of the contract of purchase, and the substitution of a different contract the parties did not make. Nor can it be said that the vendor, because of the vendee's default in payment of the purchase-money, has an election to rescind the contract of purchase, and treat the vendee as a tenant. It requires the consent of both parties to rescind as well as to make a contract."

In Kentucky, it is held that one entering as vendee under a contract of sale is not a tenant at will, *Harle v. M' Coy*, 7 J. J. Mar. 318; and is not liable to an action for use and occupation after failure on his part to comply with the contract, *Id.*; *Johnson v. Beauchamp*, 9 Dana 124; but he is held entitled to notice to quit or a demand of possession unless he has converted his possession to a tortious one, *Harle v. M' Coy*, *supra*. He is not, however, entitled to the statutory notice to quit, *Venable v. McDonald*, 4 Dana 337.

In some States the vendee is held to be a tenant at will for some purposes but not for others. In New Jersey it was said, in *Brewer v. Conover*, 3 Harr. 215, that the relation of landlord and tenant did not exist where entry was made under a contract for a purchase, and it was held that an action for use and occupation could not be maintained against the vendee; but in *Freeman v. Headley*, 33 N. J. Law 523, which was a case in which the defendant had entered on premises under a contract of sale, ZABRISKIE, Ch., in delivering the opinion of the Court of Errors and Appeals, said: "The defendant was in possession of the premises under the plaintiff in such manner as to make him a tenant at will for the purpose of sustaining an action on the case in the nature of an action of waste. He was not a tenant for the purpose of sustaining an action for use and occupation, at least such is the weight of authority, although even on this point there is a serious conflict of authority; but the decision of the Supreme Court in the case of *Brewer v. Conover*, 3 Harr. 215, must place that question at rest in this State. The dictum of Justice NEVIUS in that case, that the relation of landlord and tenant does not exist in case of occupation under contract of sale, cites as authority and is based on the case of *Smith v. Stewart*, 6 Johns. 46. In that case, which was an action for use and occupation against a purchaser who had occupied under a contract for sale not carried out, the Court remark: 'The better opinion is that he never was strictly tenant and never entitled to notice to quit, nor liable to distress nor to an action of assumpsit for rent. This opinion is not inconsistent

with the idea that for certain purposes he may be considered a tenant, or in the situation of a tenant, even if it is not viewed as countenancing that doctrine. He may not be a tenant for the three purposes named; and yet for the purpose of being prohibited, when called to surrender, from disputing the title of the person from whom he derived possession, and for being liable for unauthorized spoliation when thus lawfully in possession, he may well be considered as a tenant.'” After citing in addition the cases of *Suffern v. Townsend*, 9 Johns. 35; *Jackson v. Miller*, 7 Cow. 747; *Howard v. Shaw*, 8 M. & W. 118, and *Gould v. Thompson*, 6 Metc. 224, the Chancellor concluded: “Upon these authorities and upon principles applicable to the case, I have no difficulty in holding that a purchaser in possession of lands, under a contract to purchase, whether written or verbal, is a tenant at will for the purpose of sustaining an action on the case in the nature of waste, for destruction committed while in such possession.”

In Tennessee, the Court, in *Chilton v. Niblett*, 3 Humph. 404, said that a vendee in possession “is not the actual tenant of the vendor, but for some purposes has been held *quasi* his tenant, but never, as we believe, so as to warrant his demanding a notice to quit when he refuses to complete the purchase;” and see *Den v. Webster*, 10 Yerg. 513.

In Georgia, the vendee, on failure to comply with his contract, is liable to ejectment without notice, *McHan v. Stansell*, 39 Ga. 197; *Burnett v. Caldwell*, 9 Wall. 293; and in Illinois, without notice or demand, *Prentice v. Wilson*, 14 Ill. 91; and so in Ohio, *Baker v. Lessee of Gittings*, 16 Oh. 485.

In Vermont, the vendee is not a tenant in such sense that use and occupation can be maintained against him, *Stacy v. Vermont Central R. R. Co.*, 32 Vt. 551.

In New Hampshire, a sort of double character is attributed to the vendee in possession, and he may be proceeded against as a trespasser or held liable in use and occupation at the election of the vendor, *Clough v. Hosford*, 6 N. H. 233; *Lyford v. Putnam*, 35 Id. 563; *Alton v. Pickering*, 9 Id. 494; *Woodbury v. Woodbury*, 47 Id. 11. The right to bring use and occupation was in *Clough v. Hosford* rested upon the theory that the vendor might waive the tort of the vendee, and so proceed in assumpsit; but this position was abandoned by the Court in *Woodbury v. Woodbury*, in delivering the opinion in which case SARGENT, J., said: “The extent of this doctrine is that where the wrongdoer has sold the property unlawfully taken or detained and received the money for it, the owner may waive the tort and ratify the sale and maintain assumpsit for money had and received to the use of such owner,” and the ground upon which the Court sustained the action in the case before it was thus stated: “Where a man under a con-

tract to purchase, by permission of the vendor, enters upon the premises and enjoys a beneficial use and afterwards fails to complete the purchase it is doing no more violence to the facts of the case to hold that the purchaser was during the term a tenant at will, and that the law implies a promise to pay reasonable rent for such beneficial use when the real contract is rescinded, than to hold that the purchaser originally with force and arms broke and entered the plaintiff's close, for such was in no sense the fact. Instead, therefore, of the plaintiff's waiving the tort, there was in fact no tort to waive. But the defendant, by refusing to perform his contract, has put himself in a position where he may be properly treated as a trespasser, or as a tenant with equal propriety at the election of the owner, having placed himself in that position by his own wrong act subsequently to his entry, though in fact he did not enter either as trespasser or tenant."

It is also held in New Hampshire, that a mere agreement to purchase and sell does not give to the vendee a right of entry, *Lyford v. Putnam*, 35 N. H. 563; and that where the vendee under an agreement enters with authority to clear the land in a husbandlike manner, and does not do so, the abuse of his authority will render him liable in trespass, *Wendell v. Johnson*, 8 N. H. 220.

In Wisconsin, in the case of *Wright v. Roberts*, 22 Wis. 161, the Court doubted whether the vendee under agreement in possession, where the contract failed, was liable in use and occupation; but the question was not decided, as in the agreement in the case there was an express provision that from the date of the contract the vendee should hold as a tenant at sufferance, and there were other provisions which showed the intent of the parties to establish a tenancy in the interval.

Status of Vendee in Possession when Contract Fails through Fault of Vendor.

III. When the contract has failed through the default of the vendor, while the vendee may be considered as a tenant at will, yet he is not liable in an action for use and occupation for the time preceding the default of the vendor, *Bell v. Ellis's Heirs*, 1 Stew. & Pat. 294; *Little v. Pearson*, 7 Pick. 301; *Hough v. Birge*, 11 Verm. 191; *Jones v. Tipton*, 2 Dana 295; *Sylvester v. Ralston*, 31 Barb. 286; *Dwight v. Cutler*, 3 Mich. 566; and he will be entitled to emblements, *Harris v. Frink*, 49 N. Y. 24; and his only accountability in the way of compensation for the use of the premises is that he will be held liable to the vendor for what he has actually made by way of profit from his occupancy of the premises, after making full allowance for his improvements and expenses, *Coffman v. Huck*, 24 Mo. 496, S. C. 19 Id. 435.

Remainders. Vested Remainders.

DOE EX DEM. BARNES AND OTHERS v. PROVOOST AND OTHERS.

Supreme Court of Judicature of New York, February Term, 1809.

[Reported in 4 Johnson 61.]

P. devised lands to his daughter C. “during the term of her life, and immediately after her death unto and among all and every such child and children as the said C. shall have lawfully begotten, at the time of her death, in fee-simple, equally to be divided between them, share and share alike.” It was held, that the four children of C. who were living at the time of the devise, and at the death of the testator, took a vested remainder in fee, and that in case there had been any children born afterwards, the estate would have opened for their benefit; and that the children of a daughter of C. who died in the lifetime of her mother were, therefore, entitled to the share of C. who was living at the death of the testator.

THIS was an action of ejectment brought to recover the undivided one-fourth part of a house and lot in the First Ward of the city of New York. The cause was tried at the last sittings, and a verdict taken for the plaintiff, subject to the opinion of the Court, upon the following case :

Peter Praa was seized in fee of the premises, and by his will, dated 5th August, 1739, devised as follows: “I devise to my daughter, Christiana Provoost, the dwelling-house and ground she now lives on, to hold the said house and ground for and during the term of her life; and immediately after her death, I give the same unto and among all and every such child and children as the said Christiana shall have lawfully begotten, at the time of her death, in fee-simple, equally to be divided between them share and share alike.”

It was admitted that the house and ground mentioned in the devise were the premises in question, and that the defendants were in possession.

It was proved, that under the devise, Christiana continued in possession until her death in 1798, leaving Jonathan Provoost her only surviving child, *the father of the defendants*, and that at her death,

Jonathan entered into the possession of the premises, and remained in possession about eight years, and until his death ; and that he, by his last will, specifically bequeathed the premises to his heirs, who entered under it at his death. Christiana had four children by her husband, David Provoost, at the time of the will, and at the death of Peter Praa, and one of them, Catharine, died intestate before her mother, leaving the lessors of the plaintiff her heirs at law.

Upon this case, the point raised by the plaintiff was, that all the children of Christiana were entitled to a proportional part of the premises, and that their representatives are now entitled to it, although some of the children died before Christiana.

D. B. Ogden, for the plaintiff.—The children of Christiana Provoost, who were living at the death of Peter Praa, took a vested remainder. This is the natural and obvious construction of the will, and the only one consistent with the evident intent of the testator. The testator gives to all the children, and to each child its proportional part. He meant to provide for C. Provoost and her issue : and all her children, whether living or not, would take at her death, the remainder being vested at the death of the testator.

In the case of *Wimple v. Fonda*,* such a devise was held to create a vested remainder.

In the case of *Cook v. Cook*,† it was decided that the words “ begotten,” and “ to be begotten,” are to be construed the same, and that though there was only one child living at the death of the testator, the estate should open and take in an after-born son.

T. A. Emmet, contra.—The question is whether there was a vested or a contingent remainder. It was, no doubt, the intention of the testator to provide for any after-born children of C. Provoost. Where there is any person, *in esse*, capable of taking, the estate will vest, and open again as to the children after-born ; and where a contingent remainder is limited to several persons, it will vest in the person first becoming capable of taking, and open again as to any persons becoming capable during the continuance of the particular estate.‡ Yet if a man devise land to the children of I. S., no children born after the death of the

* 2 Johns. Rep. 288.

† 2 Vern. 545.

‡ Cruise's Dig., Tit. 16, c. 5, § 11.

testator can take.* In the case of *Wimple v. Fonda*, there was a person *in esse*, capable of taking at the time of the devise. Where a person devised land to his son for life, and after his death, to his son's children, this was held to be a contingent remainder in fee.† The uncertainty of the words of description will make a remainder contingent. Here the word "*children*" is itself uncertain, and that uncertainty is increased by the words "lawfully begotten at the time of her death."‡ It was not the intention of the testator to provide for grandchildren; and grandchildren cannot take where there are children capable of taking at the time.§ The words lawfully begotten necessarily qualify the word children. They are intended to exclude illegitimate children, and the true sense and construction is, such lawfully begotten children as C. Provoost shall have, at the time of her death. The use of the words, "all and every such *child* and children," evidently shows that the testator not only meant such children as should be living at the time of his death, but that he had in view a possible survivorship among the children.

VAN NESS, J.—That the construction given to the clause of the will by the counsel for the plaintiff, accords with the intention of the testator, can hardly be doubted; and the only question is, whether he has made use of sufficient words to effectuate his intent?

It is a rule in the construction of wills, particularly of those inartificially and obscurely drawn, to advert, in order to discover the intention of the testator, to his situation, at the time of making the will, as to the number of his children, the different kinds of property of which he was seized, etc. (6 Crui. Dig. 158, and the cases there cited). When this will was executed, the testator's daughter, Christiana, had four children; and, judging from the great length of time she lived after the date of the will, the testator undoubtedly supposed it probable that she might have several more. His intention was, and such, I think, is the fair construction of the words he has made use of to give the property in question to his daughter, during her life, and to her descendants after her death. But as a devise of the remainder to her children then born, would exclude any children she might afterwards have, he has, by the terms of his will, endeavored to guard against such an event.

* Shep. Touch. 418. (436.)

† *Goodright v. Dunham*, Doug. 264.

‡ 2 Bos. & Pull. 289. Cro. Eliz. 630.

§ 2 Vern. 107.

On the part of the lessors of the plaintiff it is insisted, that upon the testator's death, the whole estate vested at the same time ; namely, an estate for life in his daughter, and a remainder in fee in her children then living ; and, that in case Christiana should have borne any other child or children, after the date of the will, that the estate in remainder would open for the purpose of letting in "such child or children" for their share. On the part of the defendants it is admitted that, upon the death of the testator, Christiana took an estate for life ; but it is contended, that the remainder was contingent, and did not vest until her death ; and that then it went to her surviving child, under whom the defendants claim.

This latter construction of the will is extremely harsh, and opposed not only to the justice of the case, but, in my opinion, to the manifest intention of the devisor. The effect of it would be to exclude the grandchildren of Christiana altogether ; and it ought therefore not to be allowed unless the words of the devise admit of no other reasonable interpretation. I think the devise does admit of another construction, and one perfectly warranted by the words in which it is expressed.

The word *begotten* is here used as synonymous with the word *borne* ; and, substituting the latter word, the will would read thus : "Such child or children as the said Christiana shall have lawfully borne at the time of her death." These latter words, "at the time of her death," evidently signify the same as *in her lifetime*. If the words, "at the time of her death" in the will, be taken in the sense here stated, and the words, "shall have begotten," be considered as a verb in the future tense, the result will be the same ; the devise will then read thus : "such child or children as the said Christiana shall have lawfully begotten (or borne) in her lifetime." The word "begotten" in this view of the case is, indeed, liable to some criticism, but the sense in which the testator has here used it, cannot be misapprehended. In adopting this interpretation, I cannot perceive that any violence is done to the words of the will itself ; the whole of which, on the contrary, is thus rendered plain and intelligible, every presumption of a limitation in favor of the surviving heirs is repelled, and the clear intent of the testator effectuated.

The result of this construction is, that, upon the decease of the devisor, Christiana took an estate for life, and her four children then living took a vested remainder in fee ; and, in case there had been any

after-born child or children of Christiana, the remainder would have opened for their benefit, so that the property, in the language of the will, might be equally divided between them, share and share alike.

To give effect to the construction set up on the part of the defendants, we are compelled to add to the devise the word "surviving," and to read it thus: such *surviving* child or children as she may have, lawfully begotten, at the time of her death. This would make the remainder contingent, because of the uncertainty of the person who is to take; as it was unknown which, or whether any of the children of Christiana, would survive her. But it is an established rule, that the Court never construes a limitation into an executory devise, when it may take effect as a remainder, nor a remainder to be *contingent*, when it can be taken to be *vested*. (6 Crui. Dig. 444, s. 11, 3 Term Rep. 488, *Ives v. Legg*, in note.)

This rule applies with peculiar force to the present case and greatly increases my repugnance to the construction insisted upon by the defendants. Here, consistently with the terms of the will, it may be so construed as to give to the children of Christiana, born at the date of the will, a vested remainder. And, can there be any hesitation, in furtherance of the intent, to adopt such a construction, more especially when the rights of the grandchildren are saved thereby, who would otherwise be entirely excluded?

In *Oates ex dem. Hatterly v. Jackson* (2 Str. 1172), the devise was to the wife for life, and after her death to her daughter Isabella, and her children on her body begotten, or to be begotten, and their heirs in fee. Isabella, the daughter, at the time of making the will, had one daughter, and afterwards two sons and another daughter, all of whom she survived. It was held that Isabella took as joint tenant with all her children, as well that born at the time of making the will, as those born afterwards; and that it was no objection to the vesting of the estate in the children, because it commenced at different times. The words "to be begotten," used in this case, do not distinguish it from the one under consideration; because, "begotten," and "to be begotten," in the construction of wills and settlements, signify the same thing. This has been frequently so decided. (*Cook v. Cook*, 2 Ver. 545, 2 P. Wms. 426, *Hunt v. Ireland*.) In the case of *Doe ex dem. Willis and Others v. Martin* (4 Term Rep. 39), the lands by a marriage settlement were conveyed to trustees, to the use of the wife for life; remainder to

the use of the husband for life, remainder to the use of the children of the marriage, *or such of them, etc.*, as the husband and wife *should appoint*; and, for the want of such appointment, to the use of every the child or children equally in fee. There were several children of the marriage, and no valid appointment having been made, it was held, that *all* the children took a vested, and not a contingent remainder. But the case of *Doe v. Perryn* (3 Term Rep. 484), is perhaps more exactly in point, though I think it a stronger case than the present. There the devise was to the niece of the testator, then a *feme covert*, for life, remainder to trustees, to preserve contingent remainders, remainder to all and every the children of the niece, begotten, or to be begotten, on her body, and their heirs, to be equally divided between them, with divers other remainders, for default of issue of the niece. The niece had no issue till after the death of the testator, and then she had three children. It was held, notwithstanding, that the estate *vested* on the birth of the first child of the niece, and that it afterwards opened for the benefit of the children subsequently born. The reasoning of Buller, J., in this case is very forcible: He says, "but if this (the estate) were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born, who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor." In the case before us, the estate in remainder vested immediately upon the death of the testator, Christiana having four children then living; and nothing has occurred since to divest it, for there was not even the birth of another child. (See also the cases of *Ives v. Legg*, and particularly, 1 Vez. jun. 174. *Cunningham v. Moody*, 1 Inst. 188, a, Har. and But. note 72, tit. Tenants in Common.) Some of these cases arose upon deeds, but the same rule prevails in the construction of wills. A devise of lands operates as an appointment to uses, in nature of a legal conveyance. (Cowper 304, 305, *Hogan v. Jackson*.)

I am of opinion, therefore, that the intention of the testator, as fairly deducible from the will, was, after the death of his daughter Christiana, to give this property to all her children, born, or to be born after the date of the will; that the children, upon the death of the testator, took a vested remainder, and consequently, that the plaintiff is entitled to judgment, for an undivided fourth part of the premises in question.

KENT, Ch. J., THOMPSON, J., and YATES, J., were of the same opinion.

SPENCER, J.—Peter Praa was seized in fee of the premises in question, which he devised as follows: “*Item*, I give and bequeath unto my daughter Christiana Provoost, the dwelling-house and ground she now lives on, to hold the said house and ground for and during the term of her life, and immediately after the death of the said Christiana, I give the above devised premises unto and among all and every such child and children as the said Christiana Provoost shall have lawfully begotten at the time of her death, in fee-simple, equally to be divided between them, share and share alike.” Under this devise, Christiana continued in possession until her death in the year 1798, leaving Jonathan Provoost, her only surviving child, and father of the defendants; and who on her death entered into possession, and continued therein until his death, prior to which he specifically devised the same, and the devisors entered.

Christiana Provoost had four children by her husband David Provoost, at the time Peter Praa made his will, and at the time of his death; and one of them, Catharine, died before her mother, leaving the lessors of the plaintiff her heirs.

Is the remainder devised after the determination of the life estate, vested or contingent? If it be of the former kind, then it was capable of alienation, or descent; if of the latter, then the ancestor of the lessors, not being in *esse*, at the determination of the particular estate, took nothing by the devise. After the fullest consideration given to this question, my opinion is, that the remainder is contingent, and that none of the children of Christiana took anything by the devise, unless living at her death. The devise is clearly contingent, as to the children who might be born of Christiana after the devise; but that circumstance, I admit, does not give a decisive character to the remainder, with respect to those who were *in esse* at the time; for it is well settled, that a vested remainder is subject to open on the birth of children, or the happening of events designated by the devisor.

There are no cases precisely parallel to the present; and I say, in the language of Lord Chief-Justice Wilmot, that cases upon wills have no great weight, unless they are exactly to the very point, and similar, in every respect, to the case before the Court. I am ready to admit, that

the leaning of Courts, if Courts ought to lean, should be in favor of vested remainders. But if this doctrine be carried too far, we should not only distort and violate the words employed by devisors as signs of their ideas, but we should obliterate from our books all traces of distinction between vested and contingent remainders. The law benignly supposes, that wills are made *in extremis*; it does not, therefore, exact the same technical nicety in wills as in deeds; but the rule is, to read the will, and, by its language and its evident intention, to collect its sense and meaning, and then to carry that intention into effect, if, consistently with the rules of law, it can be done. In interpreting this will, I conceive it my duty so to construe it, as to avoid absurdities, and to pay particular attention to the state of things when it was made. The devisor had a daughter then married, who had four children; he contemplated the probability or possibility that this daughter might have other children, that her husband might die, and that she might have illegitimate children; he contemplated also the possibility, that of the four grandchildren then living, some of them might die before their mother. I say all these events were contemplated by the testator, because the will evidently points to them all. The remainder is not devised to such children as Christiana should have, but to such child and children as she should have, clearly indicating, that it entered into his intention, that if by death there should be but one surviving child, then the remainder should go to that one. The remainder is given not only to such child and children as Christiana should have, but to such child and children as she should have lawfully begotten; thus clearly manifesting an intention to exclude illegitimate children, and admitting the possibility that she might have such. And then, as I read the devise, the remainder is given to such legitimate child or children as Christiana shall have at the time of her death; or, in other words, to such legitimate children of Christiana as shall be living at the time of her death. In common *parlance*, "having children," when applied to any particular period, denotes children living. If it had been asked of Christiana, just before her death, "how many children have you?" the answer would have been, "three." Had the querist wished to have known more, and to have ascertained how many children she had borne, he would have put a different question, by asking, "how many children have you had?" To maintain, that the devisor meant to give the remainder to all the children that should be born of Christiana, without

reference to their being living at the time of her death, and without making that the contingency, leads to great absurdities ; it supposes, that the testator considered her capable of begetting children, a quality not attributable to females ; and the testator must be presumed either to have introduced the words "at the time of her death," without any meaning, or to have meant to exclude from inheriting, those children which she might beget after her death. If meaning is to be given to the words, "at the time of her death," it appears to me impossible to give them any other construction, than to consider it an epoch, by which the testator meant something ; and by referring this back to such child and children as his daughter should have, evidently means, such as she should have living at the time of her death.

I can never agree to reject words employed in a will, when they can have a sense and operation ; and much less can I agree to construe words in such a manner as to produce absurdity, and make a testator speak nonsense. We have no right fancifully to substitute one mode of expression for another. We have no right to make a new will, but can only expound it upon known rules of construction, without violating the plain and obvious intent of the devisor.*

The case of *Doe v. Perryn* † is supposed to bear strongly on this case. But it is very distinguishable from it. There the devise was to Dorothy Comberbach for life, remainder to trustees to preserve contingent remainders, remainder to all and every the children of Dorothy Comberbach, begotten or to be begotten on her body by J. Comberbach, and their heirs forever, to be equally divided between and among such children. The devisor then devised over the estate, if Dorothy died without issue. Comberbach and his wife had no issue at the time of the testator's death ; they had three children, who died without issue, and in the lifetime of their parents. The question was, whether any interest vested in the children of Dorothy. It was contended, that if the children of Dorothy took a fee, the limitation over took effect, on the failure of issue of Dorothy, at the death of the survivor of Dorothy and her husband. The Court were unanimously of opinion, that there was nothing in the will to limit the devise to such children as were living at the death of the survivor of Dorothy and James ; and Ashhurst, J., decides that case on this precise point, that there was nothing

* 2 Eq. Ca. Abr. 345, A. (4.) 9 Mod. 159.

† 3 Term Rep. 484.

in the will to show, that the devise must necessarily be confined to children living at the decease of their parents.

In the present case, it is manifest to me there are such words, and that the deviser's intention is clear, that the remainder should enure to such legitimate children only, as Christiana should have, living at the time of her death. If this will be read without the words "lawfully begotten," there could be no doubt; these words can have no other operation than to denote the intention, that the child and children the testator meant to provide for, should be legitimate.

The struggle with my brethren seems to be, to make the grandchildren of the testator also objects of the devise, and to give such a construction to the will, so as not to exclude the issue of the child of Christiana, who died in her lifetime. Had the testator denoted an intention to provide for his grandchildren, I should have tried very hard to effectuate that intent; but I see no such intention in the will. In every view of the subject, I am confirmed in the opinion, that this remainder is contingent, and that, as the event on which the interest of the lessor's ancestor depended, did not happen, by her being alive on the death of Christiana, the defendant is entitled to judgment.

Judgment for the plaintiff.

"A remainder is a residue of an estate in land depending upon a particular estate and is created together with the same, and in law Latin is called *remanere*," Co. Litt. 49 a. "Remainder in legal Latin is *remanere*; for that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time," *Id.* 143 a. Blackstone's definition of a remainder is, An estate limited to take effect and be enjoyed after another estate is determined, Blackst. Com., Lib. II., p. 164. Kent's definition is more satisfactory than either of those given above in that it brings out more clearly the fact that a remainder depends on the existence and not upon the destruction of the prior estate; it is as follows: "A remainder is a remnant of an estate in land depending upon a particular prior estate, created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it," Kent's Com., Vol. 4, p. 197; and see *Wood v. Griffin*, 46 N. H. 230; and it is of the essence of a remainder that

it is to arise immediately upon the determination of the particular estate by the occurrence of some preordained event and not in abridgment of such estate; and thus a devise to A. for a time certain and on the expiration thereof to B., or a devise to A. until C. returns from Rome and then to B. in fee, is an example of a remainder, for in neither case does B.'s estate arise until the happening of the event fixed as the termination of A.'s estate; but a devise to A. and the heirs of his body until C. returns from Rome, then to B., or to A., and if C. shall return from Rome, then to B., would not be a good remainder, because the fee-tail vested in A. is not permitted to come to a natural termination, but is destroyed by the gift over on the contingency. See *Church in Brattle Square v. Grant*, 3 Gray 142 (*ante*, Vol. I., 168).

Statutory Definition of Remainder in New York and other States.

* The New York Revised Statutes give the following definition of a remainder: "When a future estate is dependent upon a precedent estate it may be termed a remainder, and may be created and transferred by that name," Rev. Stat. (Throop, 1882), Part 2, Ch. 1, Tit. 2, § 11, p. 2175; and this definition has been adopted in Michigan, Howell's Ann'd Stat. (1882), § 5527, p. 1442; Minnesota, Gen. Stats. (1878), Ch. XLV., § 11, p. 561; and Wisconsin, Rev. Stat. (1878), § 2035, p. 614. The definition of the Civil Code of California is the same, except that it inserts after the words "a future estate" the words "other than a reversion," which are left to be implied in the definition as it appears in the New York Statutes, Civil Code, § 5769, p. 684.

The code of Georgia entirely repudiates the necessity of a precedent

* It may here be remarked that legislation in New York, and in those States which have followed in the footsteps or have been imbued with the spirit of the Revised Statutes, has practically destroyed remainders, properly so called, in the States in which it has taken effect. The name has, it is true, been retained (except in Alabama, as to contingent remainders, and even there we find the judges, unable to throw off their early training, speaking of contingent remainders in spite of the Code); but the estate, with its peculiar requirements and characteristics, has been taken away, and instead of it we have a future estate, which needs no particular estate to support it; which is subjected to a statute of perpetuities; which, even if limited on a prior estate, need not vest immediately upon its termination; and which in other particulars differs from the remainder at common law. As, however, the name has been retained, and as, in many respects, there is a strong resemblance between the two estates, it has been thought proper to treat the statutory and the common law remainders together, and to point out their differences as their consideration naturally arises in the course of this and the following note.

estate to support a remainder, and defines it as follows: "An estate in remainder is one limited to be enjoyed after another is determined or at a time specified in the future," Code (1882), § 2263, p. 555, and a particular estate is declared unnecessary to support the remainder by § 2264, p. 556.

Properly speaking, a remainder cannot be limited of an estate for years, for it is but a chattel; but remainders in chattels real are recognized by statute in California, Civil Code, § 5773, p. 684; Michigan, Howell Ann'd Stat. (1882), §§ 5536, 5537, 5539; New York, Rev. Stat. (1882), Pt. 2, Ch. I., Tit. 2, §§ 20, 21, 23, p. 2177; Wisconsin, Rev. Stat., §§ 2044, 2045, 2047, p. 615; Minnesota, Gen. Stat., Ch. XLV., §§ 20, 21, 23; Indiana, Rev. Stat. (1881), § 2959, p. 588; and may in such States be created subject to certain statutory restrictions.

Creation of Remainder.

A remainder may be created by either will or deed.

When created by deed, it may be well limited in favor of persons not parties to the deed, Co. Litt. 231 a; *Webb v. Holmes*, 3 B. Mon. 404; *Phelps & Stewart's Lessee v. Phelps*, 17 Md. 120. And see St. Germain, Doct. & Stud., Dial. 2, Ch. 20.

It may be limited in the habendum, although not mentioned in the premises of a deed, *Wager v. Wager*, 1 S. & R. 373; *Wommack v. Whitmore*, 58 Mo. 448; and without the use of the word remainder, *Wager v. Wager*, *supra*; and the latter part of a deed has been allowed so to control the former as to render what seemed a fee a life estate in the first taker, with a remainder over; thus, in *Prior v. Quackenbush*, 29 Ind. 475, a deed was made "to C. and her heirs forever," and contained above the signature of the grantor the following clause: "N. B.—Now the foregoing . . . is . . . with this express condition that foregoing described piece of land shall, at the death of Catharine, be forever thereafter to E. S. and L. S., and that they, the said E. and L., are the only heirs contemplated in the foregoing deed." It was held that although the qualifying clause was found in neither the habendum nor the premises, but in the "note," yet it did not lose its effect, and divided the fee into a particular estate and remainder.

Remainder Created by a Reservation.

A remainder may be created by a reservation of a life or other estate in a deed, *Barrett v. French*, 1 Conn. 354; *Fish v. Sawyer*, 11 Id. 545; *Dennett v. Dennett*, 40 N. H. 498; in the last cited case the operation of the deed with a reservation was held to be a covenant to stand seized to the use of the grantor

for the estate reserved, and after its determination to the use of the grantee. In *Bissell v. Grant*, 35 Conn. 288, there was a deed to the children of the grantor, reserving to the grantor and wife the use of the premises for life—in passing on the effect of the deed, the Court said: “A remainder only passes by the deed, and the life estate is excepted and retained even though the reservation is contained in the habendum of the deed.”

By the Effect of a Proviso.

A remainder may be raised by the effect of a proviso; thus, in *Williams v. Ratcliff*, 42 Miss. 145, the devise was as follows: “I also give unto J. and W. the quarter section of land, my late residence, and farm; provided, however, that the children who are now living with me hold a home on said home plantation until otherwise provided for:” this was held to give a life estate to the children, for their possession might by possibility so long endure, with remainder after the death of the children to J. and W.

Words Importing a Greater Estate in First Taker Cut down to a Life Estate with a Remainder by Context.

Words importing a greater estate than one for life in the first taker may by force of the context be so limited as to give the first taker a life estate only, with a remainder over. See *Reeder v. Spearman*, 6 Rich. Eq. 89; *Gillam v. Caldwell*, 11 Id. 73.

A deed to a woman and her children, she at the time having no children, has been held to give a life estate to the first taker, with remainder to the children, *Moreland v. Hunley*, 37 Ga. 342; but it has been held otherwise where the children were *in esse* at the date of the deed, *Loyless v. Blackshear*, 43 Ga. 327.

In *Davis v. Hardin*, 80 Ky. 672, a distinction was taken between the case of a deed to a woman and her children made by the husband of the woman, and that of such a deed made by another person, and it was held that while in the latter case a joint estate might be considered to be given, yet in the former the presumption was that the husband gave a life estate to his wife, with remainder to his children. In support of this position, the Court cited *Webb v. Holmes*, 3 B. Mon. 404, and *Foster v. Shreve*, 6 Bush 523; and so explained *Powell v. Powell*, 5 Bush 620, which was cited *contra*, as to deprive it of authority as to the question before the Court. It perhaps should be remarked, however, that in *Davis v. Hardin*, the deed was in trust for the wife and the infant child of the grantor and “any other child or children” of the wife by the grantor begotten; and also that the Court, in its opinion, alluded to the tender years of the only child

born at the date of the deed as a reason for presuming that the intent of the deed was to give a life estate with a remainder. But it is thought that the broader position taken by the Court in the early part of the opinion, to wit, that it could not be presumed that a man who was making a provision for his wife and children, intended to vest such an estate of inheritance in his wife, as could be by her conveyed to strangers in blood, is founded in reason, and should control in those States and cases where the intent of the grantor can legally supply the want of technical expressions in fixing the quantity of the estate granted.

Remainder Created in Certain States by what would Formerly have been a Limitation in Tail.

In certain States, where estates tail have been modified or abolished, the effect of a limitation which before such abolition or modification would have created an estate tail is to create a life estate in the first taker, with a remainder in fee to his issue, Connecticut, Act of 1784, Gen. Laws (1875), Ch. VI., § 3, p. 352; Arkansas, Rev. Stat. (1874), Ch. 31, § 5; Illinois, Rev. St. (1880), p. 266, § 6; Missouri, Stat. 1866, p. 442; New Jersey, Act 1820, see *Den ex d. Spachius v. Spachius*, 1 Harris. 172; *Den ex d. James v. Dubois*, Id. 285; Ohio, 1 Rev. St. (S. & C.) 550; Rhode Island, Gen. Stat., Ch. 171, p. 312; Vermont, Gen. Laws, 1862, p. 446; Georgia, Acts 1799, 1821; Code (1873), p. 391.

Where Rule in Shelley's Case has been Abolished.

In those States where the rule in Shelley's case has been abolished, a limitation expressed to be to one for life, with remainder to his "issue," "heirs," "children," or other words of like import, will have the effect of giving a life estate to the first taker, with a remainder over, *Williams v. Angell*, 7 R. I. 145; *Monarque v. Monarque*, 80 N. Y. 320; *Tesson v. Newman*, 62 Mo. 198; *Voris v. Sloan*, 68 Ill. 588; *Feltman v. Butts*, 8 Bush 115; *Sharman v. Jackson*, 30 Ga. 224; *Turman v. White*, 14 B. Mon. 570.

Remainder Created, although the Expression Used is that the Estate Descend or Inherit.

A remainder has been held to have been limited, although the testator in directing the course of the estate has used the word "descend," when the intent of the testator to create a remainder is plain, the word "descend" in such case being given the force of "go to." Thus in *Halsted v. Hall*, 60 Md. 208, there was a devise of certain lands to Harriet Goldsmith for life,

at her decease to W. H. Gardner, and to descend to his female children and grandchildren. It was held that Gardner took a life estate, and that a remainder in fee was limited to his female children and grandchildren. The Court saying: "The use of the word 'descend,' taken in connection with the rest of the language of the devise, cannot be understood to mean to vest the fee or an estate tail in Captain Gardner because inconsistent with its general intent to vest it, subject to the life interests, in the children and grandchildren." And see also *Tate v. Townsend*, 61 Miss. 316; *Jones v. Crowley*, 68 Ga. 175; and a remainder has been held to be created where the provision in the will was that certain children should "inherit" the land given to the first taker (their mother) for life, *Moore v. Weaver*, 16 Gray 305.

By Vesting of Executory Devise.

A remainder may be raised by the vesting of an executory devise, which, when it happens, has the effect of turning all limitations subsequent to and dependent upon it into remainders; see *Wilkes v. Lion*, 2 Cow. 333, in which case SANFORD, Ch., after referring to the rule that that interpretation of a deed or devise which will create a vested interest is to be favored, and to the rule that a remainder must be supported by a particular estate, said: "It is entirely agreeable to those rules that when the first devise becomes executed and forms a particular estate capable of supporting a remainder, succeeding devises shall be considered as remainders."

Rules Governing Creation of a Remainder.

There are certain rules which govern the creation of remainders irrespective of their character, whether vested or contingent, which may be briefly stated as follows:

No Remainder Without a Particular Estate.

1. No remainder can be made without a particular estate to support it, on the natural determination whereof the limitation over is to vest in enjoyment, *Church in Brattle Square v. Grant*, 3 Gray 142; *Wilkes v. Lion*, 2 Cow. 333; *Horton v. Sledge*, 29 Ala. 478; *Doe, Lessee of Poor v. Considine*, 6 Wall. 458; *Hennessy v. Patterson*, 85 N. Y. 91; but as we have seen, *supra*, in some States this rule is not in force.

What Estate will Support Remainder.

The particular estate necessary to support a remainder may be an estate tail, Co. Litt. 49 a; *Roe, Lessee of Evans v. Davis*, 1 Yeates 332; *Hall v.*

Priest, 6 Gray 18; *Taylor v. Taylor*, 63 Pa. St. 481; for life, Co. Litt. 49 a, and this is the most ordinary case; (by statute in Michigan, How. Ann'd Stat., § 5534, New York, Rev. St. (Throop, 1882), Pt. 2, Ch. 1, Tit. 2, § 18, p. 2176, Wisconsin, Rev. St., § 2042, p. 615, Minnesota, Gen. St., Ch. XLV., § 18, no remainder can be created upon an estate for the life of any other person or persons than the devisee or grantee unless the remainder be in fee, or in the case of a term of years for the whole residue of the term); or for years, Co. Litt. 49 a; 4 Kent's Com. 198; *Ballard v. Ballard*, 18 Pick. 41; Rev. Stat. Indiana (1881), § 2959, p. 588. In some States certain statutory regulations have been adopted as to limitations over after estates for years; thus in California, Civil Code, § 5777, p. 685, New York, Rev. St., Pt. 2, Ch. 1, Tit. 2, § 21, p. 2176, Michigan, Howell's Ann. Stat. (1812), § 5537, Wisconsin, Rev. St., § 2045, p. 615, Minnesota, Gen. St., Ch. XLV., § 21, no estate for life can be limited as a remainder on a term of years except to a person in being at the time of the creation of the said estate; and there are also, in those States, certain regulations which refer to contingent remainders after terms of years.

As land will pass by a devise of the rents and profits thereof (see *ante*, Vol. I., p. 60), it is held that a bequest of the "income" of an estate to several persons for life, is a sufficient devise of an estate to support a remainder limited over on the death of the survivor of the life tenants, *Mather v. Mather*, 103 Ill. 607; and see also *Tate v. Townsend*, 61 Miss. 316.

The particular estate cannot be an estate at will or sufferance, for the only way in which an estate at will or sufferance can be determined is by its destruction; and on the other hand a remainder cannot be limited after a fee, for the particular estate, and the remainder or remainders limited thereupon make in all but one fee, and hence when the fee is out of the grantor (whether absolutely, or, if we follow Fearn's rule, potentially on the arising of a contingency) there is left in him nothing out of which to construct a remainder, *Macumber v. Bradley*, 28 Conn. 445; *Blanchard v. Brooks*, 12 Pick. 47; *Bowman v. Lobe*, 14 Rich. Eq. 277; *Horton v. Sledge*, 29 Ala. 478; *M'Donald v. Walgrove*, 1 Sand. Ch. 274; *Downing v. Wherrin*, 19 N. H. 9; *Jackson ex d. Brewster v. Bull*, 10 Johns. 19; *Jackson ex d. Livingston v. Robins*, 15 Id. 169; *Jackson ex d. Livingston v. De Lancey*, 13 Id. 537; *Ramsdell v. Ramsdell*, 21 Me. 288; *Ide v. Ide*, 5 Mass. 500; *Alden v. Johnson* (Supreme Court of Iowa), 19 N. W. Rep. 696; and this is the case where the particular estate is not in express terms a fee, but where an absolute control, such as is inconsistent with the limitation over, is given to the particular tenant, *Jackson ex d. Livingston v. Russell*, 13 Johns. 539; *M'Lean v. Macdonald*, 2 Barb. 534; *Weir v.*

Michigan Stove Co., 44 Mich. 506. In *Green v. Sutton*, 50 Mo. 186, the grantor made a deed in fee-simple in trust "for the sole use of Nancy A. Green, and to such uses as she may appoint by will, and in case of intestacy to issue of Nancy A. and Henry Green" in default of issue "over," the Court held that the remainders could not be sustained. BLISS, J., in delivering the opinion, said: "A life estate is usually created by words of express limitation, and will not be assumed unless there are such words or their equivalent. If the deed shows by other provisions that the grantor intended his grantee to hold an estate for life only, such would be its effect. But if there be inconsistent provisions, some indicating a power of absolute disposal, which can only be had by the holder of the fee, and others creating a remainder which supposes a life estate, then the words of the habendum should have a controlling significance." In *M'Donald v. Walgrove*, 1 Sand. Ch. 274, there was a devise of real estate "to be at the disposal of" the first taker, with the further direction that if any part remained unsold at her death it should go over. The remainder over was held void. But it has been held that where there is an express gift for life with remainder over, a power of appointment and disposal vested by the same instrument in the first taker will not cause the remainder to be void; thus, in *Burleigh v. Clough*, 52 N. H. 267, there was a devise by a testator to his wife "to her use and disposal during her natural life, . . . and what is remaining at her decease undisposed of by her, I give to J. E. D. in fee." The devise over was upheld as a vested remainder, notwithstanding the power to defeat it given to the particular tenant. In *Edwards v. West*, 32 Miss. 167, there was a devise to S. "to use and dispose of in any way she may think proper during her natural life, and at her death to W. to him and his heirs forever." The devise over was held to be a vested remainder; and see *Hamlin v. U. S. Express Co.*, 107 Ill. 443. The remainder will be the more readily upheld where the power of the life tenant is limited as to the disposition of the estate, to certain purposes or upon a certain contingency; see *Minot v. Prescott*, 14 Mass. 496; *Morford v. Diffenbacher* (Supreme Court of Michigan), 20 N. W. Rep. 600; or where the power of appointment is limited to be made amongst members of a certain specified class of persons. See *Patrick v. Morehead*, 85 N. C. 62.

In Georgia it is broadly held that an estate in remainder cannot be limited after an estate of inheritance, *Cook v. Walker*, 15 Ga. 457, S. C. 21 Id. 370; and while in view of the fact that an estate in remainder may be limited after an estate tail, the bold statement seems to conflict with the law as generally held, still, as in Georgia, the gift of an estate tail takes effect as a life estate in the first taker with remainder in fee to his children generally, the remainder after an estate tail there is really a limitation over after a

fee, and it is thought that the opinion of the Court in *Cook v. Walker* would undoubtedly express the law in States where estates tail have been turned into fees-simple, either in the first taker or in his issue, except when applied to limitations antedating the abolition or modification of estates tail.

The rule that a remainder cannot be limited on a fee applies where the first given estate is a base fee or a fee conditional, *Deas v. Horry*, 2 Hill Ch. 244; *Mazyck v. Vanderhorst*, Bailey Eq. 48; *Adams v. Chaplin*, 1 Hill Ch. 265; *Church in Brattle Street v. Grant*, 3 Gray 142; *Hennessy v. Patterson*, 85 N. Y. 91; but the rule is not violated by a limitation of a fee followed by a limitation in case the first limited fee fails to take effect. *Buzby's Appeal*, 61 Pa. St. 111; *Way v. Gest*, 14 S. & R. 40; *Waddell v. Ratteu*, 5 Rawle 231; *Hennessy v. Patterson*, 85 N. Y. 91; *City of Peoria v. Dart*, 101 Ill. 609; and the validity of alternative provisions is recognized by statute in California, Civil Code, § 5696, p. 679; New York, Rev. St., Pt. 2, Ch. 1, Tit. 2, § 25, p. 2177; Michigan, Howell's Ann'd Stat., § 5541, p. 1443; Minnesota, Gen. St., Ch. XLV., § 25, p. 562; Wisconsin, Rev. St., § 2049, p. 615.

The rule that a remainder cannot be limited after a fee, has been enforced even where the fee first granted is one which has become such by the conversion of an estate tail through the operation of a statute. Thus in *Goodrich v. Harding*, 3 Rand. 280, there was a devise to Thaddeus, and in case he should die without heir the lands "to descend to my son William." The Supreme Court of Virginia held that the devise gave an estate tail by implication to Thaddeus with a remainder to William, but that as the statute of 1776 had converted Thaddeus's particular estate into a fee-simple, the remainder over was void.

The rule that a remainder requires a particular estate to support it does not apply in the case of an equitable estate; see *Barclay v. Lewis*, 67 Pa. St. 316, in which case HARE, P. J., said: "The rule that a remainder must be sustained by a particular estate does not apply to trusts. It grew out of the doctrine of the feudal law, that there must always be a tenant to the *praecipe*, or in other words some one who could perform the public and private services, by which men then held their lands. Where an estate was given in trust, the trustee was answerable for these before the law, and it was immaterial that the beneficial interest lay elsewhere."

Particular Estate not Necessary in certain States.

The necessity of a particular estate to support a remainder would seem to be done away with in those States in which statutes have been passed declaring that estates of freehold may be created to commence *in futuro*;

see New York Rev. St., Pt. 2, Ch. 1, Tit. 2, § 24, p. 2177; Michigan, Howell's Ann'd Stat., § 5540; Minnesota, Gen. St., Ch. XLV., § 24, p. 562; Wisconsin, Rev. St., § 2048, p. 615; Texas, Rev. St. (1879), Tit. XIX., Art. 556, p. 93; or which declare that any limitation which would be good as an executory devise or bequest shall be good if created by deed; see Virginia, Code (1873), Ch. 112, § 5, p. 888; West Virginia, Rev. St. (1879), Ch. 82, § 5, p. 551.

And in some States there is an express declaration that a contingent remainder shall not fail for want of a particular estate to support it, Virginia, Code (1873), Ch. 112, § 12, p. 889; West Virginia, Rev. St., Ch. 82, § 12; Kentucky, Gen. St. (Bull. & Fel., 1881), Ch. 66, Art. III., § 2, p. 607; and in Georgia it is declared that no particular estate is necessary to support a remainder, Code (1882), § 2264, p. 556.

The statutes of Indiana declare that a remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate, Rev. Stat. (1881), 588; and in the statutes of New York, Rev. Stat., Pt. 2, Ch. 1, Tit. 2, § 27, p. 2177; Michigan, Howell's Ann'd Stat., § 5543, p. 1443; Minnesota, Gen. Stats., Ch. XLV., § 27, p. 562; Wisconsin, Rev. St., § 2051, p. 616; California, Civil Code, § 5778, p. 685, it is stated that a "remainder" may be so limited; but later in the article in each case the limitation over is spoken of as a conditional limitation, to which class of estates it properly belongs.

Remainder and Particular Estate must Pass out of the Grantor Simultaneously.

2. The remainder must pass out of the grantor simultaneously with the creation of the particular estate, "for by the law there can no remainder depend upon an estate, but that the same estate beginneth at the same time that the remainder doth;" Doct. & Stud., Dial. 2, c. 20; Co. Litt. 378 a; Plow. 25 a; 4 Kent's Com. 233; *Doe, Lessee of Poor v. Considine*, 6 Wall. 458; but it has been held that it may so pass as to leave the fee *in nubibus*; *Bohon v. Bohon*, 78 Ky. 408; although Mr. Fearne is of the contrary opinion. This question will, however, be found discussed *infra*, p. 347. The reason for the necessity of the remainder and particular estate passing at once is, that the particular estate and the remainder are but one entire estate in law, Co. Litt. 49 b; *Wimple v. Fonda*, 2 Johns. 288; as a consequence of this doctrine, if the particular estate is void or is defeated, the remainder falls with it, as if an estate for life on condition be given with a remainder over, and the grantor enters for breach of condition during the life of the particular tenant, in that case the grantor is in as of his former

estate; see 4 Kent's Com. 235. But to this rule there are exceptions which arise where the particular estate is defeasible and the remainder is by good title, as Lord COKE says: "It is regularly true that where the particular estate is defeated that the remainder thereby shall be also limited, but it faileth in divers cases. For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible and the remainder by good title, there, though the particular estate be defeated, the remainder is good. As if the lessor dis-seize A., lessee for life, and make a lease to B. for the life of A., the remainder to C. in fee, albeit A. reënter and defeat the estate for life, yet the remainder to C. being once vested by good title shall not be annulled; for it were against reason that the lessor should have the remainder again against his own livery; and this is well warranted by the reason of Littleton in section 521. So it is if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good for that it was once vested by good title, for in both of these cases there was a particular estate at the time of the remainder created," Co. Litt. 298 a. In certain States it is provided by statute that a forfeiture of the particular estate shall not destroy the remainder.

Remainder must Vest during Existence of Particular Estate, or Immediately on its Determination.

3. The remainder must vest in the remainderman during the existence of the particular estate, or *eo instanti* that it determines, *Doe ex Lessee of Poor v. Considine*, 6 Wall. 458; *Barclay v. Lewis*, 67 Pa. St. 316; and the reason for this rule, as given by Lord HARDWICKE, in *Hopkins v. Hopkins*, 1 Atk. 590, is, "That a freehold cannot be in abeyance; that there must be a tenant of the freehold to perform services, to answer to a præcipe, and all suits to be brought concerning the realty, or otherwise there would be a failure of public service and of public justice."

From the operation of this rule must be excepted those States mentioned on page 278.

To whom a Remainder may be Limited.

Subject to the rules as to the time within which a remainder must vest it may be limited to anybody capable of taking any other estate, or even to a person not *in esse*, as is the case in many contingent remainders; but it is held that where a limitation in remainder is made to a corporation

which at the time of the creation of the limitation has no power to take lands, and the instrument which creates the remainder shows no expectation on the part of its maker that in the interim the corporation shall obtain power, and does not give the remainder upon the contingency that the power shall be acquired, the remainder will be a void one, and can never take effect notwithstanding the fact that the corporation acquires the power before the expiration of the particular estate, *Leslie v. Marshall*, 31 Barb. 560; but in Maine and Massachusetts a grant for pious uses to a parish not yet erected has been held to give a good remainder, and the fee has been held to remain in the grantor until the parish comes into being, *Proprietors of the Town of Shapleigh v. Pilsbury*, 1 Me. 271; *Rice v. Osgood*, 9 Mass. 38; and the Supreme Court of the United States, in a case which arose in Vermont, held that there might at common law be a grant to pious uses in which the fee would remain in abeyance until there was in existence a competent grantee to take it; but in the same case it was held that where a town charter reserved a certain share of land for glebe land of the Church of England, and there was no church or parish erected by the crown in the said town before the Revolution, or by the State afterwards, a voluntary society of Episcopalians could not entitle themselves to the said land, which had, in 1794, been granted by the State of Vermont to the town, *The Town of Pawlet v. Clark et al.*, 9 Cr. 292. See also *The Ministers, Elders, and Deacons of the Reformed Protestant Dutch Church of Schenectady v. Veeder*, 4 Wend. 494.

A gift in remainder may be made to one who, at the date of the instrument, is incapable of taking land, where the instrument shows a contemplation of the removal of the incapacity; in such case, if, before the time for entrance upon the enjoyment of the estate arrives, the incapacity is removed the remainderman will take. Thus, in *Darcus v. Crump*, 6 B. Mon. 363, a devise was made with a remainder over to certain slaves, for whose purchase and manumission the will made provision; the remainder was held to have been well limited.

Statutory Restrictions upon Limitation of Successive Life Estates.

By statute in California successive life estates cannot be limited except to persons in being at the creation thereof, Civil Code, § 5774, p. 685; and the same rule prevails in New York, Rev. Stat., Pt. 2, Ch. 1, Tit. 2, § 17, Michigan, Howell's Ann'd Code, § 5533, Wisconsin, Rev. St., § 2041, p. 615, Minnesota, Gen. St., Ch. XLV., § 17, with the additional provision that when more than two successive estates for life are limited all those subsequent to those of the two first entitled shall be void.

Vested Remainders.

In the rest of this note it is proposed to treat of vested remainders and the limitations which produce them, leaving the subject of contingent remainders for a subsequent note.

Numerous definitions have been given of a vested remainder. In *Pearce v. Savage*, 45 Me. 90, it is defined as an estate *in praesenti*, though it is only to take effect in possession and pertainancy of profits at a future period; and see *Jackson's Adm'r v. Sublett*, 10 B. Mon. 467; in *Doe, Lessee of Poor v. Considine*, 6 Wall. 458, it is said to be "where a present interest passes to a certain and definite person, but to be enjoyed *in futuro*;" and see *Bowling's Rep's v. Doby's Adm.*, 5 Dana 434; but no definition seems more full and at the same time more concise and clear than that of Judge SHARSWOOD in his note to Blackstone's Commentaries, Lib. 2, p. 164, which is as follows: "A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that if the particular estate were to expire or end in any way at the present time some certain person would become thereupon entitled to the immediate enjoyment."*

When a Remainder is said to be Vested.

The test of the character of a remainder is to be found in its present capacity for being taken, should the particular estate now expire, not in the probability or improbability, possibility or impossibility, of its outlasting the life of the particular estate. As said in *Williamson v. Field*, 2 Sand. Ch. 533: "The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues;" and see *Croxall v. Shererd*, 5 Wall. 268; *Brown v. Lawrence*, 3 Cush. 390; *Leslie v. Marshall*, 31 Barb. 560; *Foster v. Wetherill*, 11 Phila. 172; *Marshall v. King*, 24 Miss. 90. LOWRIE, J., in *Manderson v. Lukens*, 23 Pa. St. 31, gave the following brief test: "An unpossessed estate is vested if it is certain to take effect in possession by enduring longer than the preceding estate; any additional contingency destroys its vested character;" and see *Boyer v. Smith*, 1 Del. Co. Rep. (Pa.) 93.

*Since, as I have informed the reader in the preface to this volume, my distinguished friend and collaborateur was dead before the notes to this volume were written, I may say before they were fairly begun, I trust that no misunderstanding will arise should his words be found frequently quoted in this and subsequent pages, for, as is well known by all readers of Judge Sharswood's opinions and writings, his style is distinguished for lucidity and comprehensiveness of expression.—H. B.

The test of vesting is solely in the right, and no amount of uncertainty that the estate will ever be enjoyed by the remainderman will render a remainder contingent, *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Leighton v. Leighton*, 58 Me. 63; thus where an estate is given to A. for life and after his death to B., B. has a vested remainder; although he may not outlive A., *Allen v. Mayfield*, 20 Ind. 293; *Smith v. West*, 103 Ill. 332.

It may be noted, however, that in New Hampshire there are to be found decisions which conflict with this rule; thus in *Hall v. Nute*, 38 N. H. 422, there was a devise to E. T. for life, and after her death "to W. T. for life, and no longer, after her death" over. The remainder to W. T. would at first sight certainly seem to have fallen within the definition of a vested remainder, since by enduring longer than the life estate of E. T. it would be sure to come into possession; but the Court made a distinction between a remainder after a life estate and after the death of the life tenant, and held the remainder contingent. PERLEY, C. J., in delivering the opinion of the Court, said: "W. T. could not take the estate in remainder until the death of E. T. If her estate were destroyed during her life by forfeiture or by surrender and merger in the inheritance, the remainder limited to W. T. could never vest in possession. . . . If the remainder had been limited on the life estate of E. T., then, whenever that estate determined, whether by death or otherwise, W. T., while he lived, would have been an ascertained person, qualified to take, and the remainder would have been a vested and not a contingent remainder. But this remainder is not limited to take effect on the determination of E. T.'s estate for life, but can only take effect on and after her death, and that makes the remainder contingent." The same conclusion was reached and the same reasoning followed in *Robertson v. Wilson*, 38 N. H. 48.

It is submitted that the construction by the learned New Hampshire Court is a forced one; it can scarcely be doubted that the intention of the devise was to give a remainder after a life estate, and the mere fact that he expressed the limitation over as on the occurrence of the event which usually terminates a life estate, *i. e.* the death of the life tenant, and did not mention the other unusual and exceptional methods of its termination, should not have the effects of frustrating this intention; to make a contingent remainder a real contingency must be contemplated, and the true construction of such a devise as that in *Hall v. Nute* would seem to be to hold that it gives a vested remainder, which it was expected by the testator would vest in enjoyment on the death of the particular tenant, but the enjoyment of which will be advanced on the determination of the life estate by any means; for it certainly would utterly defeat the will of the testator to hold that on the determination of the life estate, say by a

forfeiture, that the estate in remainder being contingent on the death of the life tenant before the destruction of his estate, would be destroyed as not being able to vest in possession *eo instanti*, that the particular estate was determined.

Statutory Distinction between Vested and Contingent Remainders.

The New York Revised Statutes distinguish the two classes of remainders as follows: "Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of lands upon the ceasing of the intermediate or preceding estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain," Rev. St., Pt. 2, Ch. 1, Tit. 2, § 13, p. 2176. The New York statutes have been followed in this particular by those of Michigan, Howell's Ann'd Stat., § 5529, p. 1442, Wisconsin, Gen. St., § 2037, p. 614, Minnesota, Gen. St., Ch. XLV., § 13, p. 561.

Rules for Determining the Character of Limitations.

In the interpretation of limitations two rules are to be borne in mind, which arise out of the reluctance of the law to postpone the absolute control of an estate, and thereby to tie up its alienable and conveyable quality.

The first, which applies to wills, is that where a limitation is so made, that is, is susceptible of interpretation either as a remainder or an executory devise, it will be held to be a remainder rather than an executory devise. *Doe ex d. Barnes v. Provoost*, 4 Johns. 61; *Moore v. Lyons*, 25 Wend. 119; *Wilkes v. Lion*, 2 Cow. 333; *Manice v. Manice*, 43 N. Y. 303; *Blanchard v. Blanchard*, 1 Allen 223; *Blanchard v. Brooks*, 12 Pick. 47; *Hall v. Priest*, 6 Gray 18; *Nightingale v. Burrell*, 15 Pick. 104; *Stehman v. Stehman*, 1 Watts 466; *Wall v. Maguire*, 24 Pa. St. 248; *Criley v. Chamberlain*, 30 Id. 163; *Burleigh v. Clough*, 52 N. H. 267; *Doe, Lessee of Poor v. Considine*, 6 Wall. 458.

The second is that where a remainder is so limited by will or deed that it may be construed either as a contingent or vested remainder, that interpretation will always be favored which, consistently with the words of the instrument, will give a vested rather than a contingent estate to the remainderman, *Wager v. Wager*, 1 S. & R. 373; *Amelia Smith's Appeal*, 23 Pa. St. 9; *Chew's Appeal*, 37 Id. 23; *Young v. Stoner*, Id. 105; *Man-*

derson v. Lukens, 23 Id. 31; *Buzby's Appeal*, 61 Id. 111; *Womrath v. McCormick*, 51 Id. 504; *Peterson's Estate*, 88 Id. 397; *Dingley v. Dingley*, 5 Mass. 535; *Blanchard v. Blanchard*, 1 Allen 223; *Brown v. Lawrence*, 3 Cush. 390; *Doe ex d. Barnes v. Provoost*, 4 Johns. 61; *Johnson v. Valentine*, 4 Sand. Sup. Ct. 36; *Moore v. Lyons*, 25 Wend. 119; *Price v. Sisson*, 13 N. J. Eq. 168; *Cooper v. Hepburn*, 15 Gratt. 551; *Davidson v. Koehler*, 76 Ind. 398; *Hilliard v. Kearney*, Busb. Eq. 221; *Ellwood v. Plummer*, 78 N. C. 392; *Linton v. Laycock*, 33 Oh. St. 128; *Den ex d. Hopper v. Demarest*, 21 N. J. Law 525; *Gourley v. Woodbury*, 42 Vt. 395; *Rogers v. Rogers*, 11 R. I. 38; *Rood v. Hovey*, 50 Mich. 395; and a reason for this rule, in addition to that which arises from the tendency of the law to favor that interpretation of an instrument which produces certitude rather than doubtful expectancy, is to be found in the consideration that were the remainder to be held contingent, it would be in the power of the life or particular tenant to destroy it by suffering a common recovery, which would in all cases work a hardship to the remainderman, and thus in many, if not in all, cases defeat the intention of the testator or grantor.

Of course this rule is not to be pressed so far as to defeat the intention of the testator which appears from the will in connection with the circumstances at the time of its making; thus in *Richardson v. Wheatland*, 7 Metc. 169, there was a devise to H. for life, and to her husband G. for life, and at the decease of the said H. and G. the subject of the devise to be divided amongst the heirs of H. At the time of the death of the testator H. had no children, the Court held that the devise should not be interpreted so as to give a vested remainder to the collateral heirs of H.

A third rule may be borne in mind, which arises out of the repugnance of the law to intestacy, and is to the effect that where a clause is susceptible of either a contingent or vested interpretation, and the effect of holding the remainder contingent would be, in case of the contingency not happening, there being no devise over, to render the testator intestate as to the portion of his estate so limited, this will have considerable weight in influencing a court to hold the remainder vested and not contingent, *Chew's Appeal*, 37 Pa. St. 23; *Foster v. Wetherill*, 11 Phila. 172.

Liability to Divestiture does not Destroy Vested Character of a Remainder.

Following out the general principle in favor of vesting, it is held that the fact that a remainder is so limited that it may be divested, either in whole or in part, upon a subsequent occurrence, will not prevent it from being a vested remainder, *Doe, Lessee of Poor v. Considine*, 6 Wall. 458. Thus a

devise to A. for life, with remainder to B., provided that if B. died in the lifetime of A. without leaving issue, the remainder should go to C. and D.; the remainder was held vested in B., subject to defeat by his death without leaving issue in the lifetime of A., *Kelso v. Lorillard*, 85 N. Y. 177. In *Blanchard v. Blanchard*, 1 Allen 223, there was a devise to the wife of the testator for life, "all the property, both real and personal, that may be left at the death of my wife to be divided equally amongst" five children named in the will, "provided if any of the last five named children die before my wife, then the property to be equally divided between the survivors except they should leave issue, in that case to the said issue, provided the said issue be legitimate." The Court held that the remainder was vested in the children and that the proviso merely raised a condition subsequent, which might divest their estate.

In *White v. Curtis*, 12 Gray 54, a devise in trust to apply the income, and, if necessary, the land itself, to the support of T. and N. for life, with remainder to certain grandchildren, was held to give a vested remainder; and see *Verrill v. Weymouth*, 68 Me. 318; *Foley v. Foley*, 24 N. Y. S. C. 235; *Hays v. Collier*, 2 Sneed 585; *Jackson v. Sublett*, 10 B. Mon. 467; *Leah Passmore's Adm'r's Appeal*, 23 Pa. St. 381; *Buzby's Appeal*, 61 Pa. St. 111. In *Rogers v. Rogers*, 11 R. I. 38, it was held that a remainder might be vested, although by the will by which it is created there is given to a trustee a power whose exercise may destroy the interest; and it has been held that a remainder may be vested, although the contingency which is to cause its divestiture is within the control of the particular tenant, *Moore v. Weaver*, 16 Gray 305; *Shattuck v. Stedman*, 2 Pick. 468; *Bennett v. Garlock*, 79 N. Y. 302; *Burton v. Conigland*, 82 N. C. 99; thus in *Moore v. Weaver*, the remainder was held vested, although the life tenant had a power to devise the fee, and, in *Bennett v. Garlock*, though a power of appointment was vested in the life tenant; and see *Rivers v. Fripp*, 4 Rich. Eq. 276. In California it is provided by statute that the vesting of a remainder shall not be prevented by the existence of a general or specific power of appointment, Civil Code, § 5781, p. 685.

That the occurrence of a subsequent contingency may have the effect of divesting the vested remainder, it must be clearly expressed in the instrument, or the intent must be plain, that such occurrence is to have that effect, *Moore v. Lyons*, 25 Wend. 119; *Lantz v. Trusler*, 37 Pa. St. 482; *Doe, Lessee of Poor v. Considine*, 6 Wall. 458; such a contingency will be regarded as a condition subsequent, *Williamson v. Field*, 2 Sand. Ch. 533; and to work a divestiture it must have fully happened, *Chew's Appeal*, 37 Pa. St. 23; and see *Inches v. Hill*, 106 Mass. 575, and also the California Civil Code, § 6342, p. 727.

Devise of Remainder to a Class.

A very common case of a vested remainder is where there is a gift in remainder to a class, and the intention of the testator or grantee is shown to be that it shall vest at the time of the devise or grant, in which case it will vest in those composing the class at the time of the taking effect of the instrument, but the interest of each member of the class will be subject to be divested to whatever extent may be necessary in order to permit those who are members of the class at the time fixed for the enjoyment of the remainder to share therein. As a rule, it may be said generally that where there is a devise of a remainder to a class only those who constitute the class at the time fixed for the enjoyment of the land will be entitled to share in the remainder, but in the case of the class being the children of a person named, the remainder will vest in those who answer the description at the time of the devise, and if any other persons come into being so to answer the same description, the remainder will so far divest as to permit them to share with those living at the time of the devise and the descendants of those who have since died. In *Doe ex d. Barnes v. Provoost*, 4 Johns. 61, the will contained a devise to C. for life, and continued, "and immediately after her death, I give the same unto and among all and every such child and children as the said Christiana shall have lawfully begotten at the time of her death, in fee-simple, equally to be divided between them, share and share alike." At the time the will took effect, Christiana had four children, and one died intestate before Christiana. The Court held the remainder vested in the children living at the time of the death and subject to open and let in after-born children. In *Minnig v. Batdorff*, 5 Pa. St. 503, there was a devise for life to a daughter, followed by this clause: "when my daughter departs this her natural life, the children which are come or born of her body shall hold and possess my said land," it was held that the children of the daughter born at the time of the testator's death took a vested remainder, which was subject to open and let in after-born children. BELL, J., in delivering the opinion of the Court, said, after referring to *Boraston's Case*, 3 Co. 19, and 2 Powell on Devises, 215: "Where land is given to one person for life, or for any other estate upon which a remainder may be dependent, and after the determination of that estate it is devised over, whether to persons *nominatim* or to a class of persons, it will vest in the objects to whom the description applies at the death of the testator. But in devises to children, where the question has been most frequently agitated, the rule is different. Where there is an immediate gift to children, those only living at the testator's death will take; but it is now settled that where a particular estate or interest is carried out

with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution. Such a remainder vests in the objects to whom the description applies at the death of the testator, subject to open and let in others answering the description as they are born successively. As to the latter, the remainder is contingent until they are *in esse*, but then it immediately vests, and from thenceforth is attended by all the properties incidental to vested estates." In answer to the argument of the counsel for the plaintiff in error, that the words of the particular devise showed an intent that the remainder should go only to those children who should be living at the time of the daughter's death, the learned Judge said: "The sentence is certainly somewhat awkwardly expressed, but its terms are amply broad enough to cover all the children born of Elizabeth, and to hold that it confined the devise to children living at the death of the mother would be straining a point against the often expressed unwillingness of the courts to construe a remainder contingent, when it may, without any manifest violence done to the language of the testator, be supported as vested. . . . To all that was urged here, it would without more be a sufficient answer that any other construction than that we have put on this will would exclude the offspring of those of the children who might happen to die pending the particular estate, an intent in a case like the present not to be imputed to a testator unless it be undoubtedly manifested." And the *rationale* of the rule is thus expressed by PEARSON, C. J., in *Walker v. Johnston*, 70 N. C. 576: "Where there is a precedent life estate, so that the ownership is filled, and there is no absolute necessity to make a present call for the takers of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many of the objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed." And see *Ross v. Drake*, 37 Pa. St. 373; *Nichols v. Denny*, 37 Miss. 59; *Mason v. White*, 8 Jones Law 421; *Waters' Ex'x v. Waters*, 24 Md. 430; *Hamlett v. Hamlett's Ex.*, 12 Leigh 350; *Cooper v. Hepburn*, 15 Gratt. 551; *Voris v. Sloan*, 68 Ill. 588; *Bridgewater v. Gordon*, 2 Sneed 5; *Satterfield v. Mayes*, 11 Humph. 58; *Jones's Appeal*, 48 Conn. 60; *Parker v. Converse*, 5 Gray 336; *Moore v. Weaver*, 16 Id. 305; *Moore v. Dimond*, 5 R. I. 121; *Carver v. Jackson*, 4 Pet. 1; *Williamson v. Berry*, 8 How. 495; *Phillips v. Johnson*, 14 B. Mon. 172; *Woolston v. Beck*, 34 N. J. Eq. 74; *Heatery v. Van Auken*, 1 M'Cart. 189; *Graham v. Haughtaling*, 1 Vt. 582; *Yeaton v. Roberts*, 28 N. H. 459; *Hannam v. Osborn*, 4 Paige 336; *M'Creary v. Burns*, 17 So. Car. 45; *Smith v. West*, 103 Ill. 322.

Where none of the class to whom the remainder is limited are *in esse*

at the time the will takes effect, there the remainder, even if to a class composed of the children of a person named, will not be vested, but contingent, *Wistar v. Scott*, 42 Leg. Int. 48, S. C. 19 Reporter 218. And see the very learned and able opinion of ALLISON, P. J., delivered in deciding this case in the Court of Common Pleas, reported in 13 W. N. C. 295.

Where a devise of a remainder is in terms to a class, but in view of the circumstances is really as definite as to the persons to take as though they were named, and no intent is manifested by the will that the devisees should only take in case of their surviving the expiration of the particular estate, they will take vested remainders on the death of the testator. Thus, in *Alexander v. Walch*, 3 Head 493, the testator devised a remainder to be sold and the proceeds to be equally distributed amongst his brothers and sisters. At the time of making the will both of the testator's parents were dead, so that it was impossible that the class "brothers and sisters" could be augmented; it was held that the remainder was a vested one in the individual brothers and sisters.

And even where a definite time has been fixed for the endurance of the particular estate with a remainder to a class, the remainder has still been held to be vested in those members of the class living at the death of the testator, subject to open in favor of those born after said death, and even after the expiration of the particular estate. Thus, in *Ballard v. Ballard*, 18 Pick. 41, the testator made a devise to his son for ten years, and "to my grandchildren, the sons and daughters of my said son, after the expiration of ten years from my decease." It was held that the devise gave a vested remainder to the grandchildren living at the death of the testator, subject to open in favor of all after-born grandchildren, children of the son named, whether born before or after the ten years.

In California, a testamentary disposition to a class is declared by statute to include "every person answering to the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed, Civil Code, § 6337, p. 727; and see Georgia Code (1882), § 2268, p. 556.

The inclination towards an interpretation which will support a vested remainder has been carried by the Supreme Court of the United States to a very great extent. In *Croxall v. Shererd*, 5 Wall. 268, SWAYNE, J., in delivering the opinion of the Court, said: "Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children and to be divested as to those who shall die without issue;" but as opposed to this position, see *Smith v. Block*, 29 Ohio St. 488. In that case a deed was made to

Catharine Smith for life, and after her death to the children of Elijah and Catharine Smith during the natural life of each of the children, with a remainder to Elijah in fee, habendum to the said Catharine Smith during her natural life, and after her death to the said surviving children and the over. This deed was made in 1846; Catharine and Elijah were then man and wife, and had five children, one of whom was Helen Smith. In 1849 Catharine and Elijah were divorced. In 1852 Elijah made a deed to Catharine by which he conveyed the realty granted by the deed of 1846 to Catharine for life, with a remainder in fee to the children. In 1855, Helen married the plaintiff, and in 1857 died intestate. Two of the other children of Catharine died before Helen. In 1870 Catharine died. The plaintiff claimed that by the deed of 1846 a vested remainder in fee went to the children then living, and that by the deed from Elijah it became merged in the fee, and hence that the plaintiff became entitled to a life estate in his wife's share. The Court, however, held that the remainder under the deed of 1846, given to the children, was contingent upon their surviving their mother, and hence that there was no such merger as would enlarge the estate granted to a fee. WHITE, J., in the course of the opinion, said: "The children are only provided for as a class, and it is only such of the class as survive the mother for whom provision is made. If none of the children should survive the mother the intervening estate would be destroyed, and the remainderman in fee would be let into the possession immediately on the determination of the life estate of Catharine. But if any of the class survived the mother, the survivors take the intervening estate, and they postpone the remainder in fee until the intervening estate is determined."

As an example of how far a Court may go in order to favor vesting, it was intimated in the case of the *Wills of John D. and Joseph Miller*, 2 Lea 54, that a power given to a widow, life tenant, to advance to the children "their portion" recognized the fact that the children had a fixed definite portion of the property vested in each child. See, however, *contra*, *De Lassus v. Gatewood*, 71 Mo. 371; and it may be remarked that the position taken by the Court in *Millers' Wills* was not necessary to uphold the decision that the remainders limited therein were vested, since upon another ground they were clearly vested remainders, or rather reversions; for the testator bequeathed a life estate only to his wife; and the Court said: "The conclusion of the Chancellor seems to be irresistible that the decedent died intestate as to the remainder; and that each child became at her death vested by law with an undivided one-fifth share of the property in remainder, to be enjoyed upon the termination of the estate given to the widow by the will, or sooner by the exercise of the power of appointment."

Remainder may be Vested, although a Contingent Remainder Intervene between it and the Particular Estate.

The intervention of a contingent estate will not destroy the vested character of a subsequent estate, 1 Co. 137; *Roe, Lessee of Evans v. Davis*, 1 Yeates 322.

Vested Remainder given where a Certainty is Expressed as a Contingency.

A vested remainder is sometimes given, although in its creation there is used a form of words which would express a contingency; for a contingent form of creation is not sufficient in law to make a contingency, the estate must be limited over upon what is a real contingency, something which may or may not happen, or which may or may not happen at the time or under the circumstances set forth in the instrument—or the remainder limited is a vested one.

Thus, where an estate is given on or after the death of the particular tenant in any event or at any time, the remainder is a vested one, for death is certain, and no form of expression can make of it a contingency. Thus, in *Pike v. Stephenson*, 99 Mass. 188, a remainder was given “in the event of” the death of the life tenant; the remainder was held vested; and see *Adie v. Cornwell*, 3 T. B. Mon. 276.

And the fact that the death is coupled with a contingency which may advance the time at which the possession of the estate limited in remainder will commence, but which cannot postpone it or destroy the remainder, will not alter its vested character; as said by SHAW, C. J., in *Fay v. Sylvester*, 2 Gray 171: “Nor does it alter the result that the gift may, upon the happening of a contingency, come into possession and enjoyment sooner; that is, that the particular estate may sooner determine. The vesting of the gift depends upon the will, and is not affected by the consideration that the time of coming into possession is uncertain.” So where, on the marriage of a life tenant, the estate is limited to the same person who would take the remainder on the death of the life tenant, the remainder is vested, *Green v. Davidson*, 4 Baxt. 488; *Fay v. Sylvester*, 2 Gray 171; *Bentley v. Long*, 1 Strobb. Eq. 43; *Bates v. Webb*, 8 Mass. 458; *Farmers' Bank v. Hooff*, 4 Cr. C. C. 323; and see *Wight v. Shaw*, 5 Cush. 56; *Rood v. Hovey*, 50 Mich. 395.

Remainder to One on Arrival at a certain Age generally Vested.

And it may be here remarked that, for the purpose of vesting, the law regards the arrival of a person at a certain age as a fixed and certain

event, *Danforth v. Talbot*, 7 B. Mon. 623; and hence a remainder to one on his arrival at, or when he shall reach, a certain age, usually twenty-one, will be held a vested remainder, *Kerlin v. Bull*, 1 Dall. 189; *Linton v. Laycock*, 33 Oh. St. 128; *Johnson v. Valentine*, 4 Sand. Sup. Ct. 36; *Young v. Stoner*, 37 Pa. St. 105; and see *Manice v. Manice*, 43 N. Y. 303; *Coleman v. Holladay*, 3 Mumf. 510; but this is subject to the intent of the creator of the remainder, *Sanford v. Sanford*, 58 Ga. 259; and the arrival at a certain age may be so expressed as to constitute a contingency, *Megowan v. Way*, 1 Metc. (Ky.) 418; *Ex parte Roberts*, 19 So. Car. 150; *Canon v. Barry*, 59 Miss. 289.

By statute in California, testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death, Civil Code, § 6341, p. 727.

Remainder so Limited that if Affairs continue as Contemplated by Testator, the Estate will go to a Fixed Person.

When a devise is so made that, if the relative positions of affairs continue, as it is expected by the testator that they will, a remainder must, by the terms of the devise, go to a fixed and definite person, then although they are not sure to so continue, yet if the testator do not appear to have contemplated any change in the course of affairs, and, although the continuance is expressed as a contingency, the remainder will not be contingent, but vested subject to divestiture. Thus, in *Gardiner v. Guild*, 106 Mass. 25, a devise to a woman, who, at the time of making the will and of the death of the testator, had a son, followed by the words "and at her death to her oldest son, if she have one," was held to give the son a vested remainder; in *Inches v. Hill*, Id. 575, a life estate was given, with a power of appointment among the children of the life tenant, and in default of appointment, "to the use of all and every child; . . . but if such issue shall die before attaining majority or day of marriage," then over, the remainder was held vested on the death of the life tenant without exercising the power, and divestible only on the death of all the issue without attaining majority or marriage; in *Moore v. Weaver*, 16 Gray 305, the limitation was to E. for life, and after her death to her children, with liberty to E. to devise the subject of the limitation; but if she should die without such devise, "then my will is that all her children inherit the same share and share alike," the remainder was held a vested one in the children; and in *M'Gregor v. Toomer*, 2 Strobb. Eq. 51, a devise as follows: "If I shall have no other children, to S. V. for life, at her decease to be equally divided, share and share alike, among her children," was held to give a vested remainder. A remain-

der, it has been held, may be given by a provision which orders that certain persons shall have a home upon certain premises until otherwise provided for, *Williams v. Ratcliff*, 42 Miss. 146.

Words which Express what must necessarily happen on Expiration of Particular Estate will not raise a Contingency.

Words which apparently look to a future time as that of vesting, but which are in reality simply a statement of what must happen on the expiration of the particular estate, even without the insertion of the words in the limitation, will not postpone the time of vesting or render the remainder contingent—as when the expression used is, that at the death of the tenant of a particular estate the land is “to become” the property of the remainderman, *Bufford v. Holliman*, 10 Tex. 561; *Gourley v. Woodbury*, 42 Vt. 395; or “to go to and be vested in,” when the word vest is evidently used in the sense of come into possession, *Boyer v. Smith*, 1 Del. Co. Rep. 93; or where an estate is given to trustees in trust for a certain person for life and at her death “to convey” to the remainderman the land, *Darling v. Blanchard*, 109 Mass. 176; *Weehawken Ferry v. Sisson*, 17 N. J. Eq. 475; and see *Weston v. Weston*, 125 Mass. 268; *Bentley v. Long*, 1 Strobb. Eq. 43; *Bankhead v. Carlisle*, 1 Hill Ch. 357 (but see *Cole v. Crayon*, Id. 322); *M’Gregor v. Toomer*, 2 Strobb. Eq. 51; *Gourley v. Woodbury*, 51 Vt. 37; but see *Loring v. Eliot*, 16 Gray 574; *Hildreth v. Eliot*, 8 Pick. 293; and so where there is a remainder to several persons, whether by name or as constituting members of a class, a provision that on the death of the life tenant the subject of the devise shall be divided amongst the remaindermen, *Farrow v. Farrow*, 12 S. C. 168; *Chapman v. Nichols*, 61 How. Pr. 275; *Bridgewater v. Gordon*, 2 Sneed 5; *Ellwood v. Plummer*, 78 N. C. 392; *Gayther v. Taylor*, 3 Ired. Eq. 323; *Giles v. Franks*, 2 Dev. Eq. 521; *Scott v. Guernsey*, 60 Barb. 163 (affirmed by Court of Appeals in 1871); *Womrath v. McCormick*, 51 Pa. St. 504; *Linton v. Laycock*, 33 Oh. St. 128; *Porter v. Porter*, 50 Mich. 456; for there is nothing in the character of a remainder which precludes the existence of an undivided interest therein, provided a rule for the ascertainment of the share be given by the instrument creating it, *Manice v. Manice*, 43 N. Y. 303; this will apply even where the actual amount of the share of the remainderman may be varied by occurrences taking place during the existence of the particular estate; thus, in *Grier v. McAfee*, 82 N. C. 187, there was limited an estate to a particular tenant, and a “remainder to be equally divided among the grandchildren before named living at his death and my two daughters, the daughters having three shares and the grandchildren one share,” it was held that the daughters took a vested remainder.

The Fact that Charges on an Estate may Destroy it will not render Remainder Contingent.

The fact that charges upon the estate, or the purposes to which on certain contingencies it may be applied, may eat up the entire estate before it comes into the possession of the remainderman will not destroy its vested character; thus, in *Bowling's Representatives v. Dobyn's Adm'r*, 5 Dana 434, an estate limited after the death of the testator's wife, and "after the debts and schooling of children are paid," was held a vested remainder.

Remainder held Vested notwithstanding Use of Words of Futurity.

In favor of the rule of construing a remainder vested if possible, words of futurity apparently importing a contingency are, in the absence of a clearly contrary intent, regarded not as conditions precedent, or as postponing the time at which the remainder is to vest, but as specifying the time when the remainderman is to take possession of his estate, *Linton v. Laycock*, 33 Oh. St. 128; *Taylor v. Mosher*, 29 Md. 443; *Fairfax v. Brown*, 60 Id. 50; *Collier's Will*, 40 Md. 287; *Danforth v. Talbot*, 7 B. Mon. 623; *Hancock v. Titus*, 39 Miss. 224; *Roome v. Phillips*, 24 N. Y. 463; *Harris v. Alderson*, 4 Sneed 250; *Rogers v. Rogers*, 11 R. I. 38; thus adverbs of time are frequently made to refer to the time of enjoyment, and not to that of vesting, *Buzby's Appeal*, 61 Pa. St. 111; *Doe, Lessee of Poor v. Considine*, 6 Wall. 458; as "when" a certain person shall die, *Minnig v. Batdorff*, 5 Pa. St. 503, or a certain event not regarded in law as contingent shall happen, *Kerlin v. Bull*, 1 Dall. 189; "upon" the occurrence of an event not in itself contingent, *Womrath v. M' Cormick*, 51 Pa. St. 504; *Crawford v. Ford*, 7 W. N. C. 532; *Laguerenne's Estate*, 39 Leg. Int. 218; *Livingston v. Greene*, 52 N. Y. 118; *Meyer v. Eiesler*, 29 Md. 31; *Rives v. Frizzle*, 8 Ired. Eq. 237; *M'Kee's Appeal*, 96 Pa. St. 277; "from" and "after" the decease of the life tenant, *Vanderheyden & Wendell v. Crandall*, 2 Denio 9, S. C. on error sub nom., *Wendell v. Crandall*, 1 Comst. 491; *Wager v. Wager*, 1 S. & R. 373; *Dingley v. Dingley*, 5 Mass. 535; *Jeffers v. Lampson*, 10 Oh. St. 101; *Allen v. Mayfield*, 20 Ind. 293; *Bowling's Heirs v. Dobyn's Ad'r*, 5 Dana 434; *Parker v. Converse*, 5 Gray 336; *Phillips v. Phillips*, 19 Ga. 261; "at" the decease of the life tenant, *Fay v. Sylvester*, 2 Gray 171; *Wight v. Shaw*, 5 Cush. 56; *M'Neely v. M'Neely*, 82 N. C. 183; after or at the death of a life tenant, "then" to be divided or to go over, *Yeaton v. Roberts*, 28 N. H. 459; *Scott v. Guernsey*, 60 Barb. 163; *Frame v. Stewart*, 5 Watts 433; "whenever" referring to the time at which property is to be divided, or the event upon which such

division is to take place, *Manderson v. Lukens*, 23 Pa. St. 31. In *Olney v. Hull*, 21 Pick. 311, however, the Supreme Judicial Court of Massachusetts held a devise in the following terms: "Should my wife marry or die, the land to be then equally divided among my surviving sons, with each paying \$60," etc., to be a contingent remainder; and in its opinion the Court seems to have allowed the word "then" to weigh with it in reaching its conclusion. While, of course, adverbs of time may be and often are used to fix a term of vesting, yet it is thought that this case is contrary to the general current of decisions; and that the *then* should have been properly referred to the mere physical act of division, and not to the vesting, especially since, as we have seen above, the death of the wife could not, no matter how expressed, *per se* constitute a contingency, and the provision for a division was merely a provision for what was necessary to complete the enjoyment by each remainderman of his share.

Words of Seeming Condition held to Postpone Time of Possession Only.

Still carrying out the general desire of the law to declare remainders vested, words of seeming condition will, if possible, be held to have the effect of postponing the time of possession merely, and if clearly conditional will be interpreted, so far as the context will permit, as conditions subsequent and not precedent, so as to confer a vested remainder, subject to divestiture on the contingency of noncompliance with the condition, *Linton v. Laycock*, 33 Oh. St. 128. In *Roe, Lessee of Evans v. Davis*, 1 Yeates 332, after a devise in tail to J. P., the brother of the testator, a remainder was limited to another person "on this condition, that he or they [viz., his heirs or assigns] pay to the managers of the Pennsylvania Hospital for the time being the sum of £300 in three months after the decease of my said dear brother." After a full argument before M'KEAN, C. J., SHIPPEN and YEATES, JJ. (in whose opinion BRADFORD, J., though absent at the time of the argument, concurred), the Court held that the remainder was vested, and was not contingent on the payment of the £300. In *Leighton v. Leighton*, 58 Me. 63, a remainder after the death of a life tenant was limited as follows: "It is my will that my third son have all the property that remains by paying the following bequests . . . in one year from his mother's death." It was held a vested remainder, liable to be divested only on the nonpayment of the legacies as on a breach of a condition subsequent, and that an actual entry by those entitled to the estate in case of forfeiture would be necessary to actually divest the estate. In *M'Neely v. M'Neely*, 82 N. C. 183, the testator left his land for life to his wife, and at her death "to my son

by him seeing to her," the devise was held to give a vested remainder, and the words "by him seeing to her" were held not even to create a condition.

Effect of Absence of a Devise Over.

The absence of a devise over will sometimes influence a court in holding a remainder vested rather than contingent, *Young v. Stoner*, 37 Pa. St. 105; and the fact that the remainder is created by the residuary clause of a will, has been held to exert a like influence, *Rogers v. Rogers*, 11 R. I. 38.

Remainder to "Heirs."

While a remainder to "heirs" is generally held to create a contingent remainder, yet where by a will a particular estate is created with remainder to the testator's own heirs, the remainder is held vested, for since the limitation and the accrual of heirship take place at one and the same instant, the element of uncertainty which renders a limitation to heirs contingent is eliminated, for under such a limitation there is no time when there is not, to use the words of the Court in *Brown v. Lawrence*, 3 Cush. 390, "by force of the will and the law governing its application, a person *in esse*, having a capacity to take whenever the possession should become vacant." An exception to this rule may be found in *Hall v. Want*, Phillips (N. C.) Law 502, where a devise of a remainder to the testator's "heirs at law," "excluding them on the part of my sister," was held to be contingent. It may be noted, however, that the form of the devise was to the testator's son and daughter for life, "then to go," etc.; and the Court may have given a contingent force to the word "then."

Under the New York statute a devise of a remainder to the heirs of a person, is held to give a vested remainder to the person who would answer the description of heir, should the particular tenant die at the moment, subject, however, to be defeated by the death of the remainderman before the particular tenant, *Moore v. Little*, 41 N. Y. 66; *Sheridan v. House*, 4 Abb. App. 218. In the first named case the matter was quite fully considered by the Court of Appeals. In that case there was a devise to A. for life, and after his decease to his heir in fee; the rule in Shelley's case having been abolished in New York, this gave a life estate to A. with remainder to his heir, and the question being whether the remainder were vested or contingent, the opinion of the Court was delivered by WOODRUFF, J., who, after reciting the definition of remainders given in the Revised Statutes, continued: "Our statutes have taken the case out of the condition of a contingent remainder at the common law and have brought it within the statutory definition, and for the reason that in respect to any child of John

Jackson, it was at any and every moment of his life inevitably and unquestionably true that if John Jackson then died he would have an immediate right of possession of the lands. During John Jackson's life he was not heir and had not such right, but the one event which might at any moment happen determined the life estate, and *eo instanti* being heir he was entitled to possession, not by descent, but by purchase, the statute declares. . . . But it has been argued that this construction of the definition of a vested remainder leaves very little room for the application of the definition of a contingent remainder which immediately follows, and that it withdraws entirely from the test of the character in this respect the certainty or uncertainty of the person entitled in remainder.

"That definition is to be construed in connection with the other; if there is no person who would have an immediate right of possession upon the ceasing of the intermediate or precedent estate, *i. e.*, if no person can be found of whom this can now be avowed, either because if that preceding estate should now cease, it would be uncertain who was entitled, or whether the event upon which it was limited would happen, then the remainder is contingent.

"This definition is a very important one in connection with another section abrogating the common law in another particular (§ 34), which provides that no remainder valid in its creation shall be defeated by the determination of the preceding estate before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the preceding estate had continued to the same period.

"Now cases may be multiplied in which it is now true that it is uncertain who will take, or whether any specific one will take in remainder if the life tenant now dies. Such a remainder will be a contingent one. . . .

"The statute, rejecting technical expressions and phrases heretofore employed, meant by *person* just what it expresses and no more. 'When there is a person in being,' means when you can point to a human being . . . and 'who would have an immediate right to the possession of the lands on the ceasing of the preceding estate,' means that if you can point to a man, woman, or child, who, if the life estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested, and by necessary consequence all the contingencies which may operate to defeat the right of possession are to operate and only to operate as conditions subsequent." In this exposition of the definition of the statute, JAMES, LOTT, MASON, and MURRAY, JJ., concurred, and from it HUNT, C. J., DANIELS and GROVER, JJ., dissented. This case

has been recognized and followed in *House v. Jackson*, 50 N. Y. 161 ; S. C. *Jackson v. Sheridan*, Id. 660 ; *House v. M' Cormick*, 57 N. Y. 310 ; *Chinn v. Keith*, 4 N. Y. S. C. 126, S. C. *sub nom. Chism v. Keith*, 8 Id. 589 ; *Drake v. Lawrence*, 26 Id. 112.

In North Carolina it is established by statute that a limitation to the heirs of a living person shall be held to be a limitation to the children of said person unless a contrary intent appear, Bat. Rev., Ch. 42, § 5, p. 384.

In those States where the rule in Shelley's case has been abolished, and where statutes giving a definition similar to that of the New York statutes have not been adopted, a vested remainder may be given by a limitation to a person for life, with a remainder to the heirs of the first taker, with certain exceptions. Thus in *Blake v. Stone*, 27 Vt. 475, a limitation was made to L. for life, with a remainder to the heirs of L.'s body, except B. This was held to give a vested remainder to those persons who, being in existence, would become the heirs of L.'s body if they survived him.

Devise of Remainder to Survivor.

In cases in which there is a devise of a remainder to a survivor or to survivors, or in which words of survivorship are used to designate the remainderman, it often becomes important to determine to what period the survivorship is to be referred, since if referred to the time of the death of the testator, the objects of the limitation over will take a vested remainder, but if referred to a future time the survivorship itself will constitute a contingency ; the question has received considerable discussion, and there is not an entire accord between the English and American authorities upon the subject, or indeed amongst the American authorities themselves. The old English rule was that the words of survivorship, in the absence of a manifest intent that they should be otherwise applied, would be referred to the death of the testator ; but in *Cripps v. Wolcott*, 4 Madd. 11, Sir JOHN LEACH, V. C., announced a contrary rule, namely, that the reference should be primarily made to the time of the expiration of the particular estate, and this has become the English rule. In this country the question was considered at an early date in South Carolina in the case of *Drayton v. Drayton*, 1 Dess. 324, and it was held that when used in a will the words of survivorship, in the absence of a manifest contrary intent, would commonly be referred to the time of the death of the testator ; and see also *Deveau v. Barnwell*, Id. 499 ; but in *Swinton v. Legare*, 2 M'C. Ch. 440, a devise of lands to one for life, and "after her death to be equally divided among the survivors of her children," share and share alike, as they shall attain the age of twenty-one or marriage, was held to refer to those children who survived the life tenant, so

that the remainder would take effect as to them only; hence there was no vested estate in the children of the life tenant who died during her lifetime; the Court so held, although NOTT, J., who delivered the opinion, acknowledged that the testatrix probably desired to put all the grandchildren on the same footing, but he distinguished the case from *Drayton v. Drayton* on the ground that in the earlier case the remainderman was named. It is thought that this case, which almost avowedly violated the testatrix's intention, and certainly did not strain a point to favor the law's inclination to cause estates to be held vested, would scarcely be considered as authority in most courts at the present time, and that the rule as stated in *Drayton v. Drayton*, viz., that words of survivorship will be referred to the death of a testator, notwithstanding a previous interest is given by the will, is with the weight of authority in South Carolina. In 1837 the question was raised before the Supreme Court of Virginia in *Hansford v. Elliott*, 9 Leigh 79, and *Cripps v. Wolcott* was cited; the old rule was adhered to, the Court, after a learned review of the authorities by PARKER, J., declaring that "whenever the word survivor or surviving is used in a will, especially by an unlearned man, *inops consilii*, without manifesting any special intent to the contrary, the safest and soundest construction is to refer it to the death of the testator, and not give the whole estate to such legatees as happen to survive the tenant for life, or if none survive to declare a total intestacy." This case has been followed in Virginia by *Martin v. Kirby*, 11 Gratt. 67.

The same question came before the Court of Errors of New York, in *Moore v. Lyons*, 25 Wend. 119. In that case there was a devise to M. for life, and after her death to S. J. and B., her children, or the survivor or survivors of them, in fee. The Supreme Court had held the remainder contingent on the survival of S. J. or B. of M.; this decision was reversed by the Court of Errors. BRADISH, Pres., went into a learned examination of the English authorities, attacked *Cripps v. Wolcott*, *supra*, and *Browne v. Lord Kenyon*, 3 Madd. 410, and followed *Hansford v. Elliott*, and *Drayton v. Drayton*, and gave as reasons for the rule therein established, if considered as *res integra*, first, that it was most equitable; second, that it was in harmony with the policy of law which favors the partibility of estates; third, that it was in harmony with the principle which declares that a remainder should be considered vested rather than contingent.

A few years later, in 1849, the Supreme Court of Pennsylvania had occasion to consider the question. The case was *Johnson v. Morton*, 10 Pa. St. 245, in which a devise was made to the testator's wife for life, and "at her decease to descend to my three daughters, Mary, Phœbe, and Lydia Morton, or the survivors of them." In delivering the opinion of the

Court, which is in accord with that of the courts of Virginia and of New York, ROGERS, J., said: "All the authorities concur, perhaps without exception, that when the gift is immediate, that is, in possession, it is to be treated as intended to provide for the death of the objects of the testator's bounty in the lifetime of the testator; the devise affording no other point of time to which they could be referred. Of this, *Ld. Bindon v. Suffolk*, 1 P. W. 96; *Roebuck v. Dean*, 2 Ves. jr. 267; *Russell v. Long*, 4 Id. 553; *Smith v. Horlock*, 7 Taunt. 129, are examples.

"But when the limitation was not immediate (that is in possession), there being a prior life, as here, or other particular interest carried out, so that there *was* another person to which the words survivor or survivors could be referred, was a point, it seems, of more difficulty. In these cases, as well as in the cases where the gift was immediate, the courts of England, as Mr. Powell, in his *Treatise on Devises*, Vol. 2, p. 750, very correctly observes, for a very considerable period, perhaps for upwards of an hundred years, applied the words in question to the period of the death of the testator, on the idea that there was no other mode of reconciling the words of survivorship with the words of severance creating a tenancy in common. Without undertaking to decide as to the weight to be ascribed to this argument, which does not seem to meet with the approbation of the learned commentator, it cannot be disputed that for a long period decision after decision followed, in which survivorship was held to refer to the period of the testator's decease. Mr. Powell enumerates no less than nine decisions in which this doctrine is held, embracing, if any, little less than a century; viz., *Stringer v. Philips*, decided at the Rolls in 1830;* *Rose v. Hill*, by Lord MANSFIELD, in the Court of King's Bench;† *Wilson v. Bayley*,‡ in the House of Lords; *Roebuck v. Dean*,§ by Lord ROSSLYN; *Perry v. Woods*|| and *Maberly v. Strode*,¶ by Lord ALVANLEY; *Brown v. Bigg*,** by Sir WILLIAM GRANT; *Garland v. Thomas*,†† and *Edward v. Symons*,‡‡ by the Court of Common Pleas. In all these cases, notwithstanding that a previous interest was given, survivorship was referred to the death of the testator. Such was the state of the question on authority, when Sir JOHN LEACH, at that time Vice-Chancellor, in *Cripps v. Wolcott*, 4 Madd. 11, undertook to reverse the general rule and to refer the limitation in favor of survivors to the death of the tenant for life rather than the death of the testator. . . . Whether Sir JOHN LEACH will be followed remains yet to be seen, although the indications are that he will be, as in *Home v. Pillans*, 2 M. & K. 15, decided in 1833, Lord BROUGHAM is reported to have said, it would be most incon-

* 3 Ves. 204. † 3 Burr. 1881. ‡ 3 Bro. P. C. 195. § 2 Ves. jr. 265. || 3 Ves. 204.

¶ 3 Ves. 450. ** 7 Ves. 279. †† 1 Bos. & Pul. New Rep. 82. ‡‡ 6 Taunt. 213.

venient to hold that *Cripps v. Wolcott* is not to stand against the cases overruled by it; and in *Wodsworth v. Wood*, 2 Beav. 28, decided in 1839, Lord LANGDALE, M. R., said: 'The rule is, that when an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place.' But be this as it may, what is the rule here? For our part we are inclined to adhere to the law as settled prior to our Revolution, and however we may respect the opinions of Sir JOHN LEACH, they are no authority here. Besides, in addition to the reason that it is intended to prevent a lapse, the old rule has the further recommendation, that it preserves the rights of children, as here, intermediate between the time of the death of the testator and the time of the period of distribution."

This decision was followed, in 1860, in *Ross v. Drake*, 37 Pa. St. 373; in which case, in the course of the opinion, STRONG, J., pointed out that the doctrine of *Cripps v. Wolcott* had not been applied even in England to cases of realty, citing *Edwards v. Symons*, 6 Taunt. 213, and *Doe ex d. Long v. Prigg*, 8 B. & C. 231; and alluded to the law upon this subject in England as unsettled. In 1864, however, the prognostications of ROGERS, J., that the doctrine of Sir JOHN LEACH would probably be applied to devises in realty were proved to be correct. In that year the case of *In re Gregson's Estate*, 2 De G. J. & S. 428, was decided. In that case the limitation was to M. Gregson for life, and on her decease "the whole of the above freehold properties settled as aforesaid shall be shared, share and share alike, amongst the following persons, or the survivors of them." *Cripps v. Wolcott* was cited, and it was argued that the rule laid down in that case applied to bequests of personalty only; but TURNER, L. J., said: "The cases as to the real estate in which the survivorship has been referred to the death of the testator appear to have proceeded upon one or other of these grounds, that unless the vesting were held to take place at the death of the testator, the remainders would be contingent and liable to be destroyed; that, in order to avoid this and other inconveniences incidental to the tenure of real estate, the law favors the early vesting of estates, and the danger of lapse is avoided or diminished by the survivorship being referred to the testator's death; but the danger of lapse is common both to real and personal estate; and, as to the other ground, I confess that it is not satisfactory to my mind that a forced and strained construction should be put upon the words of a testator's will in order to meet the inconveniences of tenure. I think that the words of a will ought to be construed according to their natural and ordinary meaning, unless they are qualified by the context, or there be a settled rule of law affixing a different meaning upon them. It was objected as to the case of *Young*

v. *Robertson*,* that the case depended upon the law of Scotland, and that the disposition of that case was of real and personal estate blended together; but the judgment sustains me in saying that the law of Scotland as to questions of this nature is the same as the law of England, and no reliance is placed in the judgment upon the blending of the real and personal estate. Upon the whole, looking to the intent of the testator, which, in my opinion, is the governing point of the case, and looking also to the state of the authorities, I cannot but think that however the case might have been decided in time long gone by, it ought now to be decided in favor of the appellants, and that the fund in question ought to be divided between such of the devisees in remainder as survive the tenant for life." Subsequently, in 1869, in *Marriott v. Abell*, L. R. 7 Eq. 478, MALINS, V. C., recognized *Cripps v. Wolcott* as law, and said that *Re Gregson's Trust Estate* had settled the question as to the applicability of the same rule to realty.

The rule in England, therefore, seems to be settled, and we may say that the rule is settled to be directly contrary to the English rule by authority in South Carolina, Virginia, New York, and Pennsylvania; but in some other of the States the English rule has been followed. In New Jersey, in *Holcomb v. Lake*, 4 Zab. 686, there was a devise in tail to J. H., and in case he died without issue before arriving at twenty-one, that then the estate should "be equally divided amongst my [the testator's] surviving children;" the Court held that the remainder was contingent and referred the survivorship to the time of the death of J. H. without issue before the time fixed; this case, however, could be sustained upon general principles of intent, as the contingency was plain without reference to any survivorship whatever; and in *Van Tilbrugh v. Hollinshead*, 14 N. J. Eq. 32, the devise over being to the "surviving children" of the life tenant, an intent to refer the period of survivorship to his death might fairly be inferred, although upon the generally presumed intent to provide for the descendants of the life tenant much might be said on the other side; but *Williamson v. Chamberlain*, 10 N. J. Eq. 373, seems to undoubtedly follow the English rule; and in *Slack v. Bird*, 23 Id. 238, the question was fully considered, and the Chancellor, ZABRISKIE, while recognizing the fact that the authorities in New York, South Carolina, and Virginia were opposed to his view, followed the rule of *Cripps v. Wolcott*, and stated that while he considered himself bound to do so by the authority of *Van Tilbrugh v. Hollinshead* and *Williamson v. Chamberlain*, yet were the question *res integra* as to New Jersey, he would have decided the same way.

In Illinois, in *Ridgway v. Underwood*, 67 Ill. 419, the English rule was adopted to the fullest extent, the Court even quoting with approbation the

* 4 Macq. 314.

words of Jarman : viz., "the rule which reads a gift to survivors simply as applying to objects living at the decease of the testator is confined to those cases in which there is no other period to which such survivorship can be referred, and when such gift is preceded by a life or other previous estate, it takes effect in favor of those who survive the period of distribution, and those only ;" and in *Blatchford v. Newberry*, 99 Ill. 77, the same Court said : "However it may have been at some former time, we understand the rule now prevailing to be that where a gift to survivors is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only." But see *Nicoll v. Scott*, 99 Ill. 529.

The English rule is also adopted in New Hampshire. See *Hill v. Rockingham Bank*, 45 N. H. 270 ; this was a case of a bequest of personalty, but the Court intimated that the rule would be the same as to realty, and called attention to the fact that the rule of *Cripps v. Wolcott* had been sustained as to realty in some of the cases cited in the opinion. It is also adopted in Ohio, *Sinton v. Boyd*, 19 Oh. St. 30.

The question has been regulated by statute in Georgia, where the code declares that "In wills words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intent to the contrary appear," Code (1882), § 2269, p. 556 ; and California, where the rule is laid down that words in a will referring to death or survivorship simply relate to the time of the testator's death, unless the possession is actually postponed, when they must be referred to the time of possession, Civil Code, § 6336, p. 726.

Character of Vested Remainder. Attempt to Restrain Alienation Void.

A vested remainder is governed in many respects by the same rules as an estate in possession ; thus an attempt to restrain the alienation of a remainder in fee before it vests in possession is void, *Hall v. Tufts*, 18 Pick. 455.

Vested Remainder Inheritable, Devisable, and Assignable.

A vested remainder is inheritable, *Wimble v. Fonda*, 2 Johns. 288 ; *Bridge-water v. Gordon*, 2 Sneed 5 ; *Harris v. Alderson*, 4 Id. 250 ; *Clopton v. Clopton*, 2 Heisk. 31 ; *Foley v. Foley*, 24 N. Y. S. C. 235 ; *Drake v. Lawrence*, 26 Id. 112 ; Georgia, Code (1882), § 2266, p. 556 ; Michigan, 2 How. Ann. Stat. (1882), § 5551, p. 1442 ; New York, Rev. St. (Throop, 1882), Pt. 2, Ch. 1, Tit. 2, § 35, p. 2178 ; Minnesota, Ch. XLV., § 35, p. 563 ; Wisconsin, Rev. St. (1878), § 2059, p. 616 ; California, Civil Code, § 5699, p. 679 ;

devisable, *Clopton v. Clopton*, *supra*; *Glidden v. Blodgett*, 38 N. H. 74; *Davis v. Bawcum*, 10 Heisk. 406; statutes of New York, Minnesota, Michigan, Wisconsin, *supra*; and will pass under a general residuary clause of a will unless there is an apparent intent to exclude it from the operation thereof, *Floyd v. Caron*, 88 N. Y. 560; assignable, and will pass by any of the conveyances operating by the statute of uses, which do not require livery of seizin, *Pearce v. Savage*, 45 Me. 90; *Jackson's Adm'r v. Sublett*, 10 B. Mon. 467; *Hall v. Nute*, 38 N. H. 422; *Croxall v. Shererd*, 5 Wall. 268; *Gardiner v. Guild*, 106 Mass. 25; *Blake v. Stone*, 27 Vt. 475; *Blanchard v. Brooks*, 12 Pick. 47; and in the States whose statutes are cited *supra*, a future interest will pass in the same manner as a present one. A vested remainder may be so limited over by the remainderman as to be converted into a contingent remainder; thus in *Glidden v. Blodgett*, *supra*, the grantor being entitled to a vested remainder, and being in contemplation of marriage, assigned the remainder to a trustee for her separate use for life, with remainder after her death to her husband for life, remainder to the children of the marriage, with the proviso that if the husband predeceased his wife the estate should revest in her; it was held that after the execution of the deed the wife had become entitled to a contingent remainder only.

In New Jersey, Stewart's Revision (1877), p. 166, Pl. 74; Mississippi, Rev. Code (1880), § 1191, p. 345; Missouri, Rev. St., § 3947, p. 676; Virginia, Code (1873), Ch. 134, § 3, p. 968, it is enacted that the grant of a remainder or of a reversion shall be good without attornment, but no tenant who has paid rent to the grantor before notice of the grant shall suffer any damage thereby.

Vested Remainder may be Mortgaged.

A vested remainder may be mortgaged and the mortgage foreclosed during the existence of the particular estate, and it is held when it is so foreclosed the rights of the life tenant will be protected in the decree of foreclosure. Thus, in *Iowa Loan and Trust Co. v. King*, 14 Reporter 363 (Supreme Court of Iowa, June, 1882), an agreement was made between a mother and son, whereby the latter was to pay all the taxes upon certain land and keep it clear of incumbrance and should hold the fee, and the former should retain the property for life; a mortgage of the son's remainder was foreclosed, and the decree provided that the life tenant should hold the land for her life, that the mortgagee who had purchased the land at the sale on the foreclosure should pay all the taxes, and that in default thereof the lien of the mortgage or the title acquired through the foreclosure should be barred.

Vested Remainder may be taken in Execution.

A vested remainder may be taken in execution, *Jackson v. Sublett*, 10 B. Mon. 467; *Blanchard v. Brooks*, 12 Pick. 47; *Ellwood v. Plummer*, 78 N. C. 392; *Humphries v. Humphries*, 2 Dall. 223, S. C. 1 Yeates 427; *Drake v. Brown*, 68 Pa. St. 223; *Reinders v. Koppelman*, 68 Mo. 482; it will pass by an assignment in bankruptcy, *Smith v. Scholtz*, 68 N. Y. 41; and it would seem may be sold by a decree to pay the debts of a decedent. This is established by statute in Maryland, Rev. Code (1878), Art. 66, § 1, p. 653; and in Mississippi, *Williams v. Ratcliff*, 42 Miss. 146; and a voluntary conveyance of a remainder by an insolvent is fraudulent as to existing creditors, and the remainder may be reached by them through the medium of a creditor's bill, *White v. McPheeters*, 75 Mo. 286.

No Privity of Estate between Particular Tenant and Remainderman.

In other respects the remainder is subject to different rules; thus, as there is no privity of estate between the particular tenant and the remainderman—for he always takes by purchase—no act of the life tenant is permitted to affect the title of the remainderman, *Jackson ex d. Hunt v. Luquere*, 5 Cord. 221; *Doe ex d. Arden v. Thompson*, Id. 371; his admissions will have no effect upon the remainder, *Hill v. Roderick*, 4 W. & S. 221; nor can any agreement made by him with reference to the estate bind the remainderman, Id.; and where the old practice of processioning exists as a means of fixing boundaries, it is enacted that a processioning made in the lifetime of a life tenant shall not bar the remainderman, but the latter shall have five years after the death of the life tenant within which to controvert it, Virginia, Code (1873), Ch. 111, § 6, p. 886.

Possession of Particular Tenant cannot be Adverse to Remainderman.

But while there is no privity of estate between the particular tenant and the remainderman, their relations are such that the possession of the former can never be adverse to the latter, *Sutton v. Casseleggi*, 77 Mo. 397.

Particular Tenant cannot, as a Rule, Charge Remainderman with Improvements.

As a rule, the particular tenant cannot charge the remainderman with improvements, even though of a permanent character, *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Merritt v. Scott*, 81 N. C. 385; *Pratt v. Douglass*, 38 N. J. Law 516; and see cases cited in Vol. I., p. 208, and the exceptions to the rule there mentioned. It was asserted in *The Matter of Pollock*, 3 Redf.

100, that permanent improvements of property in which a person has a life estate are presumably for the benefit of the estate and chargeable to the remainderman, and that to overcome such presumption, it is necessary to show that the life tenant made the improvements, or that they were made by his procurement or on his responsibility. If confined to the case before the Surrogate, there can be little objection to the assertion, for in that case there was a trust, and the cestui que use in remainder actively interfered in the work by examining plans for the improvements with which it was sought to charge the remainder, and employing the architect under whose directions the improvements were made, and besides had from time to time received accounts of the expenses, and had never denied his liability; but if it is sought to set this up as a general rule, it is submitted that it is not only without support from authority, but is contrary to all reason, for it would entirely substitute the judgment of the particular tenant for that of the owner of the fee, and would place the latter utterly at the mercy of the former, who might "improve" the remainderman out of his property, or even subject him to a burden, for which in his own term he would have no return whatever.

Expense of Public Improvements Divided between Particular Tenant and Remainderman.

Public improvements, as we have seen, however, stand upon a different basis, and the expense incurred therefor may be divided between the particular tenant and remainderman, see *ante*, Vol. I., p. 210, and *Pratt v. Douglass*, 38 N. J. Law 516.

Statutory Enactment as to Liability of Remainderman for Improvements.

In Massachusetts, it is enacted by statute that where a life tenant recovers land and is compelled to pay the defendant a sum of money for improvements he has put upon them, he may recover their value as they then exist from the remainderman, Pub. Stats. (1882), Ch. 173, § 42, p. 1022.

And by another statute of the same State, it is provided where a part of a mill is held by a person as tenant for life or years, with remainder to another, and expenses are incurred for repairs or other things necessary for the maintenance of the mill, the expense shall be apportioned between the particular tenant and the remainderman, and for the recovery of the remainderman's share, if not sooner paid, a lien is given on the rents and profits belonging to him after his estate comes into possession, notwith-

standing any lapse of time, Pub. Stat. (1882), Ch. 190, § 66, pp. 1094-5; and the law is the same in Michigan, Howell's Ann. Stat. (1882), § 1613, p. 460.

Remainder not Divested by Attainder of Particular Tenant.

The attainder of the particular tenant will not divest the estate in remainder, *Carver v. Jackson*, 4 Pet. 1; *Roe, Lessee of Evans v. Davis*, 1 Yeates 332; and it has so been held where the vested remainder was one which was liable to open and let in after-born children, and was liable also to be divested by the exercise of a power of appointment by the person attainted, *Carver v. Jackson*, 4 Pet. 1.

Statute of Limitations will not Run against Remainderman during the Particular Estate. Descent Cast. Equitable Estate.

The Statute of Limitations will not run against the remainderman during the existence of the particular estate, *Miller v. Miller*, Meigs 484; *Chandler v. Phillips*, 1 Root 546; *M'Corry v. King's Lessee*, 3 Humph. 267; *Roberts v. Roberts*, 7 Bush 100; *Aiken v. Suttle*, 4 Lea 103; nor will a descent cast affect the remainderman, *Jackson ex d. Hardenbergh v. Schoonmaker*, 4 Johns. 390, in which KENT, J., laid down the rule and the reason thereof as follows: "Neither a descent cast nor the Statute of Limitations will affect the rights if a particular estate existed at the time of the disseizin or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate; and the laches of the tenant for life will not affect the party entitled." Where, however, the remainder is an equitable one, the rule, it seems, may in some cases be different; thus, in *Bennett v. Garlock*, 79 N. Y. 302, there was a deed to trustees in trust to manage, and, if necessary, sell, certain property, to pay for the support of the grantor and wife, and after their deaths to hold for the right heirs of the grantor and wife, subject to a power of appointment in the grantor and wife. It was held that the statute ran against the remaindermen, on the ground that the remainder was an equitable one and the fee was in the trustees.

If a tenant for life incur a forfeiture, the remainderman is not bound to treat the estate as merged and proceed at once for its recovery, but may wait until the time fixed for the natural determination of the particular estate, viz., the death of the life tenant, without peril to her legal rights, *Moore v. Luce*, 29 Pa. St. 260; and if the life tenant grant the fee there can be no possession adverse to the remainderman until the life tenant's death, *Bannister v. Bull*, 16 So. Car. 220.

Special Statutes of Limitation as to Remainderman.

In some States there is provided by statute a special limitation of the time within which the remainderman must bring his action for the land, beginning to run after the expiration of the particular estate, as in Connecticut, where the term is five years, Gen. Stat. (1875), Tit. 19, Ch. 18, § 1, p. 493.

In Massachusetts, by statute, where the bar of the statute of limitations has fully run against a tenant in tail, the remainders limited upon the entailed estate are likewise barred, Pub. St. (1882), Ch. 196, § 9, p. 1113.

Remainderman may, in some cases, Assert his Estate during the Existence of the Particular Estate.

But while the statute does not run against the remainderman, it does not follow that his hands are absolutely tied during the existence of the particular estate; thus he will be permitted to sue to remove a cloud upon the title of the estate before he becomes entitled to the enjoyment thereof, *Aiken v. Suttle*, 4 Lea 103; *Dodd v. Benthall*, 4 Heisk. 608; and if the particular tenant having been disseized or trespassed upon refuse to enter against the disseizor or trespasser, or if he acknowledge a fine for a longer period than his estate the remainderman may enter, *Wells v. Prince*, 4 Mass. 64; *Wallingford v. Hearl*, 15 Id. 471; but he is not compellable to do so, Id.; Id.

In some States it is expressly enacted that the remainderman may defend where the title is attacked in the tenant for life. See Mississippi, Rev. Code, § 2516, p. 682.

And such enactments would seem to be necessary to enable the remainderman to come in where title is tried in an action of ejectment, in which, being theoretically for the possession only, a remainderman not being entitled to possession could have, *prima facie*, no interest.

Bar of Statute having Attached against Particular Tenant, Remainderman Barred until the Natural Expiration of the Particular Estate.

Where the bar of the statute has fully attached against the life tenant, both he and the remainderman are barred during the lifetime of the former, and a conveyance by the life tenant to the remainderman will not enable the latter to bring an action for possession before the life tenant's death, *Moore v. Luce*, 29 Pa. St. 260.

Warranty.

The warranty of a life or other particular tenant, being a stranger in blood, could not, it would seem, at common law affect the remainderman in any way whatsoever; but it was otherwise where a tenant for life made alienation in fee with warranty, and the warranty descended upon the remainderman or reversioner, for there at common law the warranty would bar the remainderman, Littleton, Sect. 725; but by statute, 11 Hen. VII., cap. 20, the warranty of a woman of lands or tenements which she held in dower or in tail of the gift of her first husband or of his ancestors, or the gift of any other seized to the use of the first husband or of his ancestors, was declared void; and in this country a warranty of any tenant for life descending upon a person in reversion or remainder is expressly declared void by statute in New Jersey, Stew. Rev. (1877), p. 166, pl. 75; North Carolina, Bat. Rev., Ch. 42, § 10, p. 385; Alabama, Code (1876), § 2184, p. 572, § 2192, p. 573; and the legislation of New York, Michigan, Wisconsin, Minnesota, California, Maine, Massachusetts, in more general terms accomplishes the same object, and it is thought that the courts would not at the present day make the fact that the remainderman was also heir of the particular tenant a ground for enforcing against him in all its fulness the old feudal doctrine of warranty.

Protection against Merger, Forfeiture, or any Act of the Particular Tenant.

The remainder is expressly protected from the consequences of a merger by the union of the particular estate with an ulterior remainder in New York, Rev. St., Pt. 2, Ch. 1, Tit. 2, § 32, p. 2178; Michigan, How. Ann. St., § 5548; Minnesota, Ch. 45, § 32, p. 563; Wisconsin, Rev. St., § 2056; California, Civil Code, § 5741, § 682; Mississippi, Rev. Code, § 1199, p. 346; Virginia, Code, Ch. 112, § 13, p. 889; West Virginia, Ch. 82, § 13, p. 555; Kentucky, Gen. Stat. (Bull. & Fel. 1881), Ch. 63, Art. I., § 12, p. 586; and against the consequences of any act of the owner of the particular estate, and against the consequences of the destruction of the particular estate by disseizin, forfeiture, surrender, or otherwise. In New York, Michigan, Wisconsin, Minnesota, California (except where forfeiture is imposed by statute), *supra*, Maine (except as below noted), Rev. St. (1871), Ch. 73, § 5, p. 559, Massachusetts (except as below noted), Rev. Stat. (1882), Ch. 126, §§ 7, 8, pp. 744-45, it is likewise protected; but in Maine and Massachusetts the particular tenant in tail and the remainderman may by a joint deed bar both the entail and the remainder, Rev. St. (Maine), Ch. 73, § 4, p. 559; Pub. Stat. (Massachusetts), Ch. 120, § 16, p. 733; and in the latter State

it is enacted that a conveyance by tenant in tail which bars the entail will be also sufficient to bar remainders limited thereupon, Pub. Stat., Ch. 120, § 15, p. 733.

In New Jersey, it is provided by statute that no fine or common recovery shall bar in any way the remainderman, Act June 12, 1799; Stew. Rev. (1877), p. 167, pl. 81.

In Mississippi, Rev. Code, § 2517, p. 682; Virginia, Code, Ch. 129, § 3, p. 955; West Virginia, Rev. St., Ch. 80, § 3, p. 544; it is enacted that no default of a tenant for life shall affect the remainderman.

Partition.

Life tenants in common where there is a remainder over equally to be divided amongst the remaindermen, even if the remaindermen are the children of the life tenants, cannot make partition so as to bind them, *Jackson ex d. Hunt v. Luquere*, 5 Cow. 221; but by statute in Ohio a life tenant may apply for the sale of an estate which limited over in remainder when it can be done without injury to the remainderman, Acts, April 4, 1859, Mar. 3, 1864, April 13, 1868; and this right is not dependent upon the consent of the remainderman, *Nimmons v. Westfall*, 33 Ohio St. 213; *Oyler v. Scanlan*, Id. 308.

It would seem upon general principles that a remainderman cannot force a partition during the existence of the particular estate, *Nicholson v. Caress*, 59 Ind. 39; *Schori v. Stephens*, 62 Id. 441; and it is so declared by statute in Massachusetts, Pub. Stats. (1882), Ch. 178, § 3, p. 1029; *Johnson v. Johnson*, 7 Allen 196.

Provision is, however, made for a partition of remainders in Maine, Rev. Stat. (1871), Ch. 65, § 9, p. 521; Rhode Island, Pub. Stat. (1882), Ch. 230, § 19, p. 644; New Hampshire, Gen. Laws (1878), Ch. 247, § 1, p. 566; New York, Code Civil Procedure, § 1533, and probably in other States; but it is held in the last-named State that the right of remaindermen to partition is confined to property capable of actual division, and that the statute gives no power to the courts to order a sale for the purposes of partition, *Hughes v. Hughes*, 37 N. Y. S. C. 349; *Scheu v. Lehning*, 38 Id. 183.

Of course, there is nothing to prevent remaindermen from making a voluntary partition, either by deed or through form of law (and see *Howell v. Mills*, 7 Lans. 193, 56 N. Y. 226); and it is held that where in such case owelty is charged upon the share of one person, he cannot after a decree claim the right to postpone payment of the charge until he becomes entitled to the possession of the land, *Turpin v. Kelly*, 85 N. C. 399; for the partition is of the *remainder*, not of an estate in possession, and

the valuation must be made as of a remainder, and of course in making it the time during which possession is postponed must be taken into consideration.

Liability of Particular Tenant to Remainderman for Neglect to Keep Down Incumbrances.

If the particular tenant wilfully neglect to keep down the incumbrances on the land, he is liable to the remainderman; see Vol. I., p. 209; and in a proper case the remainderman will be entitled to equitable interference; thus where the particular tenant fails to perform his duty as to the payment of taxes, the Court may appoint a receiver to collect the rents or profits of the land and apply the same to the payment of the taxes, *Sidenburg v. Eby*, 90 N. Y. 257.

The measure of damages where the particular tenant fails to keep down the taxes, is the actual loss to the remainderman, but the liability will not be carried beyond the productive capacity of the land, and in an action to recover damages the burden of showing the productive value is upon the remainderman, *Clark v. Middlesworth*, 82 Ind. 240.

Remedies of Remainderman in Case of Waste.

The immediate remainderman may hold the particular tenant who is guilty of waste liable in an action therefor, Co. Litt. 53 a; *Wood v. Griffin*, 46 N. H. 230; *Stout v. Dunning*, 72 Ind. 343; *Dawson v. Coffman*, 28 Id. 220; or he may have an injunction to stay the waste, *Robertson v. Meadows*, 73 Ind. 43; 2 Dan. Ch. Prac. 1620; and he may maintain case in the nature of waste for injury to his interest in the freehold at the same time that a tenant for life sues for injury done to his possession, *Wood v. Griffin*, *supra*; *Randall v. Cleveland*, 6 Conn. 328; *Chase v. Heseltine*, 7 N. H. 176. Statutory actions of waste and trespass on the case are given to the remainderman in Rhode Island, Pub. Stats. (1882), Ch. 231, § 1, p. 646; New York, Code Civil Proc. (1882), § 1665, p. 331; Michigan, Howell's Ann. Stat., § 5777, p. 1501; Wisconsin, Rev. St., § 2198, p. 631; Minnesota, Gen. Stat., Ch. 75, § 42, p. 820; California, Civil Code, § 5826, p. 689 (and in this State, although at the time of bringing the action the plaintiff has parted with his remainder); Indiana, Rev. Stat. (1881), § 287, p. 50; Iowa, McClain's Ann'd Stat. (1880), § 3337, p. 871; Kansas, Comp. Laws (1879), § 3015, p. 521; Massachusetts, Rev. Stat., Ch. 179, § 1, p. 1038; Kentucky, Gen. St. (Bull. & Fel., 1881), Ch. 66, Art. III., § 2, p. 607. In New York it has been decided that the remainderman may have his stat-

utory action for treble damages without joining the particular tenant, *Van Deusen v. Young*, 29 N. Y. 9.

No Seizin of Remainder.

There is no seizin in the remainderman until he makes entry on the land or does some act which is equivalent thereto, *Wells v. Prince*, 4 Mass. 64; as a consequence of this we find that what is sometimes called seizin of a vested remainder, *i. e.* the ownership of the remainder, will not entitle the wife of the remainderman to dower, *House v. Jackson*, 50 N. Y. 161; and see cases cited in Vol. I., p. 317; or the husband of a woman owning a remainder to curtesy, see Vol. I., p. 266; but where a husband is seized of a life estate, and is also entitled to a vested remainder, which may be defeated by the death of the husband before a third person named, the wife will take dower inchoate, which may be defeated by the death of the husband before the third person, but not by the husband's alienation of the land, *House v. Jackson*, *supra*.

Acceleration of Remainder.

When a remainder is vested after a life estate, and is in form limited upon the death of the life tenant, the question often arises whether if for any reason the life estate never takes effect, or if it is determined before the death of the life tenant, as where a widow refuses a life estate given her by her husband's will, and elects to take her dower, or where a widow holding land *durante viduitate*, with a limitation over on her death, marries, the time of the enjoyment of the land by the remainderman will be advanced, or he will be compelled to wait for his enjoyment until the time which the testator in all probability originally contemplated as the time of expiration of the life estate, *viz.*, the death of the life tenant. In many cases it is held that the limitation over is to be regarded as a limitation to take effect in possession after the termination of the life estate as an estate, no matter how that termination is brought about. It is also held that where the first estate never takes effect, that the remainder limited thereafter will pass into enjoyment immediately. Thus, where the remainder is after a devise which fails for want of capacity in the devisee to take, it will not be destroyed, *Darcus v. Crump*, 6 B. Mon. 363; and so where a remainder is limited over after a life estate which never vests as being in violation of a statute; as in Michigan (Howell's Ann'd Stat., § 5535), New York (Rev. Stat., Pt. 2, Ch. I., Tit. 2, § 19, p. 2177), Wisconsin (Rev. St., § 2043), Minnesota, Gen. Stat., Ch. XLV., § 19, where more than two successive life estates are limited before the fee, then on the death

of the two first entitled in remainder, the ulterior remainderman will take as though the intermediate remaindermen were dead; and in like manner in California, where a remainder is limited after successive estates for life, some of which have been limited to persons not *in esse* at the time of the creation of the estate, then on the death of the life tenants who were living at the time of the said creation, the remainderman will enter on possession as though no other life estate had been created. In *Fox v. Rumery*, 68 Me. 121, there was a devise of a life estate to a widow in lieu of dower, the widow refused the life estate and elected her dower, the remainder in the land rejected was held accelerated; and see *Holderby v. Walker*, 3 Jones Eq. 46. In *Clark v. Tennison*, 33 Md. 85, the devise was expressly to a wife during widowhood, and *on her death* over to the children of the testator, it was held that on the marriage of the widow the possession of remainderman was accelerated.

In some cases the question of acceleration is said to be one dependent upon intention, *Augustus v. Seabolt*, 3 Met. (Ky.) 155; *Clark v. Tenison*, 33 Md. 85; *Hinkley v. House of Refuge*, 40 Id. 461; *Blatchford v. Newberry*, 99 Ill. 11; and this being conceded, it may generally be assumed that the intention of a testator is not that a person to whom an estate is limited in remainder shall enjoy that estate at a particular point or moment of time, so much as that when the primary object of the testator's bounty can no longer enjoy the estate given him, or has by his own act put an end to the said estate, that then the secondary object of the said bounty should enjoy the land; and it can rarely be said that an intent to give an intermediate contingent remainder to the heir can be discovered in a devise which makes no mention of him. Of course, however, an intention to postpone the remainderman until the actual death of the life tenant may be manifested, and where such intent is manifested it must be obeyed; but it is thought that, except where there is the intervention of a trust, this is rarely the case, except where the limitation over is in the nature of a contingent remainder to persons whose right to take is to be ascertained on the death of the life tenant. Thus, in *Augustus v. Seabolt*, 3 Met. (Ky.) 155, the limitation was to the testator's wife during her natural life, and after her death to be equally divided among the children of the testator's brother, "or such of them as may be living at the time of her death." Another clause of the will ran as follows: "In case my beloved wife shall marry, she is only to hold that part of the estate . . . which lies eastwardly" from a certain road. The widow married. The remainder was held a contingent one, and it was also held that the time of vesting was not advanced by the marriage, and that the land lost by the widow would, until her death, be the property of the heir of the testator.

Blatchford v. Newberry, 99 Ill. 11, is an example of the acceleration of a remainder being prevented by the existence of a trust. In that case there was a devise to trustees for the testator's wife and two daughters for life, subject of the devise, after the death of the wife and daughters, to be equally distributed to the children of the daughters. In case of the death of both of the daughters without issue, then immediately after the decease of the wife, if she survived the daughters, the estate to be divided into two shares, one to go to the surviving descendants of the testator's brothers and sisters, taking *per stirpes* and not *per capita*, the other share to a public use. The daughter died without issue before the mother, who renounced her interest under the will, and took her dower. On the death of the surviving daughter, descendants of the brother and sister mentioned in the will sought distribution of the estate, claiming that the estates were vested by their survivorship of the daughters' death without issue, and that the only intervening life estate having been destroyed by the act of the widow, they should now have the enjoyment of their remainders; but the Court held that the fact that the trustees had been appointed for and during the term of the wife's life, negatived any intent that the remainders should be accelerated. SHELDON, J., in delivering the opinion of the Court, which was concurred in by CRAIG, C. J., SCOTT and SCHOFIELD, JJ., said: "The doctrine of acceleration is not an arbitrary one, but is founded on the presumed intent of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the previous donee may be still alive and is applied in promotion of the presumed intention and not in defeat of his intention. And when it is the evident intent of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated. . . . When, as here, there is a dower estate and testamentary estate given for life on condition that it shall be accepted in lieu of dower, and expressly providing that the gift shall be void unless there be a formal relinquishment made of the dower estate within a specified time, and then the simple direction, without more, that the final distribution of the estate shall be upon the death of the wife. That event is the time for the distribution, whether the testamentary provision be accepted or not. . . . The principle of the rule is that a remainder is accelerated whenever it is apparent that the only object of postponing the remainderman was that the property might be enjoyed by the tenant for life. The facts of the present case preclude the idea. . . . We fail to perceive any feature here of the precedent estate upon which the ultimate remainder was limited. If the time of distribution is to be considered as dependent on a life estate, it must be considered as only contingently so on the particular testamentary substitution, in case of its

acceptance, . . . and that if not accepted it was dependent on the dower estate. . . . A life interest or dower yet remains in the widow. There is, too, the trust estate. The intermediate estate is not yet gone and out of the way." The opinion of the Court was dissented from by DICKEY, MULKEY, and WAKER, JJ., the latter in his opinion, saying: "After the renunciation of the widow and the death of the daughters, the purposes for which the trust was created were as fully completed as if the widow had first died and the daughters afterwards."

The rule as to acceleration may, we think, be stated as follows: presumptively the termination of a particular estate will advance the period of enjoyment of the remainder limited thereon, but this presumption will not be permitted to overcome an apparent intention to the contrary.

In California, Michigan, Minnesota, New York, and Wisconsin, the presumption is against acceleration. In those States it is provided by statute that where a remainder upon an estate for life or years is not limited upon a contingency defeating or avoiding such preceding estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration by lapse of time of such term of years, California, Civil Code, § 5780, p. 685; Michigan, Howell Ann'd Stat., § 5545, p. 1443; Minnesota, Gen. Stat., Ch. XLV., § 29, p. 563; New York, Rev. Stat., Pt. 2, Ch. 1, Tit. 2, § 29, p. 2177; Wisconsin, Rev. Stat., § 2053, p. 616.

But though this is the general presumption in the before-mentioned States, yet there is in Michigan, Minnesota, Wisconsin, and New York a statutory provision for acceleration in a certain case; and where a remainder is limited, after more than two successive life estates, it is enacted that the life estates beyond the two shall be considered void, and upon the death of the two persons entitled to the first two life estates the remainder shall take effect in the same manner as if no other life estate had been created, Michigan, Howell's Ann'd Stat. (1882), § 5533, p. 1442; Minnesota, Gen. Stats. (1878), Ch. XLV., § 17, p. 562; New York, Rev. Stat. (Throop, 1882), Pt. 2, Ch. 1, Tit. 2, § 17, p. 2175; Wisconsin, Rev. Stat. (1878), § 2041, p. 615. This provision has been held in New York to apply only where the ultimate remainder is vested. See *Purdy v. Hayt*, 92 N. Y. 446, which case is more fully considered in the note on contingent remainders on page 353.

In California, it is provided by statute that limitations of life estates to persons not in being are void, and that where life estates are limited to persons in being and persons not in being, a remainder limited after the latter life estates will take effect on the death of the persons in being to whom life estates were limited, Civil Code, § 5774, p. 685. There is a similar statutory proviso in Indiana; see Rev. Stat. (1881), § 2959, p. 588.

In Rhode Island, when the life tenant has been absent from the State,

and unheard of for seven years, the remainderman may enter on the land, Pub. Stat. (1882), Ch. 172, § 5, p. 442.

Statutory Provision for Production of Life Tenant.

In South Carolina, one having a remainder after a life estate may, on making affidavit that he believes that he is dead, and that his death has been concealed, compel the production of the particular tenant, Gen. Stat. (1882), § 2275, p. 649.

Substitution of One Piece of Land for Another. Right of Remainderman in Substituted Property.

Where, by agreement of the particular tenant and the remainderman, the land limited is sold and the proceeds are invested in other land, the right to a remainder will attach to the newly purchased land. This position is well illustrated by the case of *Clifford v. Farmer*, 79 Ind. 529, in which one Farmer devised certain real estate to his wife for life with remainder to his children. By the joint act of the widow and children the land was sold and the proceeds were invested by the widow in other land. The Court held that on the death of the widow the remaindermen under the will would take the newly acquired land, citing *Large's Appeal*, 54 Pa. St. 383; *Cook v. Tullis*, 18 Wall. 332; *Horry v. Glover*, 2 Hill Ch. 515. MORRIS, Com., in delivering the opinion, said: "It may be said, as it has in one or two cases, that if the remainderman can take the land purchased with the fund he may receive a part of the benefit resulting from the use of the fund by the tenant for life, to which he can have no right. To this it may be satisfactorily answered that where tenant for life voluntarily makes such an investment he ought not to be heard to say that the income of the land is more or less than the income of the fund. If more, he cannot complain; if less, he should not. By making the investment he may reasonably be presumed to have agreed to accept the income of the land in lieu of the profits of the trust fund."

Contingent Remainder.

WADDELL v. RATTEW.

Supreme Court of Pennsylvania, Philadelphia, April 16, 1835.

[Reported in 5 Rawle 231.]

Testator devised to his son A, a messuage to hold to him, during the term of his natural life; and if he should thereafter have issue of his body lawfully begotten, then to hold to him, his heirs, and assigns forever; but in case he should die without leaving such issue, then to all the rest of testator's children, their heirs and assigns forever, as tenants in common. A. suffered a common recovery and had issue, who died during his life. *Held*, that the ulterior limitation was a contingent remainder and not an executory devise, and was barred by the recovery.

ERROR to the Common Pleas of Montgomery county.

John Rattew, being seized in fee of the premises in question, by his will dated October 26, 1780, devised the same in the following words: "I give, devise and bequeath, unto my son Aaron, the messuage, plantation, and tract of land, where my son John now lives, in Middleton township, containing about one hundred nineteen acres more or less, with the appurtenances; to hold to him my said son Aaron, during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, his heirs, and assigns forever; but in case he shall die, without leaving such issue, then I give and devise the same to all the rest of my children, their heirs, and assigns forever, as tenants in common."

He also devised other estates to his other children, and to his son John, all the residue of his estate in fee.

The testator died in May, 1781, leaving children, Mary intermarried with David Waddell, now deceased. William and Aaron, both deceased without issue; and John who died leaving issue John Rattew, and Eleanor intermarried with William L. Fox, the defendants, to whom he devised the premises.

Maris Waddell, the plaintiff, claimed as one of the children and heirs of John Waddell, one of the children of Mary Waddell, the testator's daughter.

Aaron Rattew, to October Term, 1793, suffered a common recovery in the Common Pleas of Delaware county, wherein Joseph Hemphill was demandant, and Aaron Rattew tenant to the *præcipe*.

Aaron Rattew subsequently sold several parcels of the premises to various persons.

The judgment in the Court below was for the defendant; whereupon this writ of error was brought.

Dick for plaintiff in error, with whom was *Dillingham*.—Aaron took a life estate under the will, capable of being enlarged into a fee-simple on the birth of issue; but defeasible afterwards on his dying without leaving issue. The ulterior devise to the other children was therefore an executory devise, and not a contingent remainder; and not barred by the recovery. He cited *Pells v. Brown*, Cro. Jac. 590. *Fearne* 396, 397, 476, 478, 479. 1 *Preston* on Est. 86, 89. 1 *Wilson* 106. *Gulliver v. Wickett*, 1 Bro. Ch. 187. *Wilmot* 308. *Hayes* on Lim. 28. 3 *Serg. & Rawle* 470. 1 *Johns.* 451.

Edwards and *Tilghman*, for the defendant in error.—The devise to Aaron was for life, with a contingent remainder in fee to his children. If a devise can be construed a remainder, it shall never be taken as an executory devise. *Fearne* 420. 14 *Serg. & Rawle* 40. 1 *Roberts* on Wills 478. 3 *Rawle* 471. They further cited, *Preston* on Est. 93. *Fearne* 9. *Geager v. White*, Willes 355. *Finley v. Riddle*, 3 *Binn.* 139. *Dougl.* 753. 2 *Cruise Dig.* 313. 8 *Mass Rep.* 37. 1 *Prest.* on Est. 488.

Dillingham in reply, referred to 3 *T. R.* 143. 1 *Prest.* 40. *Hayes* on Lim. 81. *Prest.* 490. 1 *P. Wms.* 535.

The opinion of the Court was delivered by

KENNEDY, J.—As the question to be decided in this case, arises out of the will of John Rattew deceased, it becomes necessary in order to solve it correctly, to ascertain, if possible from the face of the will

itself, what was the intention of the testator. And after having discovered this, it will be our duty in construing the devise in question, to carry it into effect, so far as it shall be found consistent with the rules and policy of the law to do so.

The words of the will which have given rise to the present controversy are: "Item, I give and bequeath to my son Aaron, the messuage, plantation, and tract of land (where my son John now lives), in Middleton township, containing about one hundred and nineteen acres more or less, with the appurtenances, to hold to him, my said son Aaron, during his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, and his heirs, and assigns forever; but in case he shall die without having such issue, then I give and devise the same to all the rest of my children, their heirs and assigns forever, as tenants in common."

The plaintiff's counsel contend that Aaron took under the will a conditional fee, determinable upon his dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or in other words, they allege that Aaron according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee-simple estate in the land devised to him, defeasible however upon his dying without issue living at the time of his death: That the birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator, could only have operated as an executory devise; because as a contingent remainder it could not take effect after the determinable fee had become vested in Aaron. I must confess that this view of the devise in question when first presented by the counsel for the plaintiff, struck me forcibly as having something in it: and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common recovery and had issue who had died during his life, and he had then died himself without any living at the time of his death, it may possibly be that the ulterior devise of the land to the other children of the testator, would have operated and taken effect as an executory devise, for it has been said, that an estate may be devised over in either of two events, so that in the one event the devise may

operate as a contingent remainder, and in the other as an executory devise. *Doe v. Selby*, 2 Barn. & Cress. 926. S. C. 9 Eng. Com. Law Rep. 277. 2 Pow. on Dev. (by Jarman) 245. Be this however as it may, the event which has occurred in this case, does not render it necessary to decide it under such aspect: but if it did, I see no objection that could be made to it, unless it might possibly be thought by some, that to adopt such a principle, would be entrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise. *Reeve v. Long*, Carth. 310. *Purefoy v. Rogers*, 2 Saund. 380, and cases cited in note (9), also 2 Pow. on Dev. by Jarman 237. Besides this, there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel: it is this; that to constitute an ulterior limitation, an executory devise where there is a prior estate of freehold devised, the latter must not be merely *liable* to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A. for life, and after his decease to the unborn children of B., this would be a contingent remainder in such children; but under a devise to A. for life, and after his decease *and one day* to the children of B., the children of B. in this case would take an executory devise. 2 Pow. on Dev. by Jarman 238. And for the day undisposed of, between the death of A. and the time fixed for the ulterior devise to the children of B. to take effect, the estate would belong to the heir or residuary devisee. *Ibid.* *Stephens v. Stephens*, Ca. Temp. Talb. 238. Now it is obvious in the case under consideration, that the prior estate devised to Aaron for life, could not be said to be *necessarily* determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect: it was at most, even upon the construction contended for by the counsel of the plaintiff, only *liable* to be determined before that event might happen; and hence according to the rule just mentioned cannot, or at least in the event that has occurred, cannot be considered an executory devise, but must be deemed a contingent remainder. This construction seems to be requisite also, for the purpose of carrying into effect an intention pretty plainly mani-

vested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate on him for life, making it neither more nor less, with a contingent remainder to him in fee upon his dying, leaving issue living at the time of his death; we give full effect to the letter of the will, as well as the intent of the testator.

If the fee given to Aaron, which is admitted to have been determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being ever in contingency and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and therefore could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over to them, after a prior *vested* determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees limited merely as substitutes or alternatives, one for the other, that is, the first to Aaron, if he should die leaving issue living at the time of his death, but if not, then to the other children of the testator in lieu thereof; thus substituting the latter in the room of the former, if it should fail of effect. This is the principle which was decided in *Loddington v. Kyme*, 3 Lev. 431; S. C. 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation, was termed a contingency with a double aspect. *Fearne on Cont. Rem.* 373. So that if the estate vested in the one, it never could in the other. *Herbert v. Selby*, 2 Barn. & Cress. 926. S. C. 9 Eng. Com. L. Rep. 278. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron by suffering the common recovery, having determined his life estate, the only prop of the remainder, before it became vested, it fell, and never could take effect afterwards.

The plaintiffs therefore have no right to recover the land, and the
Judgment is affirmed.

JOHN H. RICHARDSON v. GEORGE WHEATLAND.

Supreme Judicial Court of Massachusetts, Middlesex, October Term, 1843.

[Reported in 7 Metcalf 169.]

A testator devised land to his daughter H. during her life, and to her husband W. during his life, and at the decease of H. and W. to be divided among the heirs of each. *Held*, that the remainder, after the termination of the life estates of H. and W. was contingent until the death of H., and vested, on her death, in those who were then her heirs at law.

THESE were actions of trespass upon the case, in each of which the declaration alleged that the defendant, on the 25th of September, 1843, was tenant for his own life of a certain lot of land in Cambridge, called the "Hotel Estate," and on that day felled, cut down, and destroyed, three elm trees there standing and growing for timber, and converted them to his own use, whereby the reversionary interest in said land had been injured. Each case was submitted to the Court on an agreed statement of facts. In the first action, those facts were as follows:

The defendant is tenant for life of the premises described in the plaintiffs' writ, and does not deny that he has committed waste. The plaintiffs claim the reversion in fee; but the defendant denies that they have any interest in the estate. Both parties claim under John Richardson, who died May 3, 1837, leaving a will, dated April 23, 1837, and proved and allowed on the 27th of June, 1837, and which, it is agreed (if competent to be proved), was actually drawn up before the 18th of April, 1837, though not signed till said 23d of April. Said will is to be taken as part of the case. The defendant, and his wife Hannah B. Wheatland, a daughter of the said testator, who took life estates in the *locus* described in the plaintiffs' writ, by said will, were both living at the testator's death. They had a child born April 12, 1837, who died on the 18th of that month, and another child (the plaintiff in the second action) born October 21, 1839. Said Hannah, wife of the defendant, died on the 15th of March, 1840. Two of the plaintiffs, viz., John H. and George W. Richardson, are the sons of said John Richardson, and the other plaintiffs are the

children of his two daughters who died during his life. Said John H. and George W. Richardson and said Hannah B. Wheatland were the only children of said John Richardson who survived him; and said John H. and George W. both had children living at the making and at execution of the said will, and at the death of the testator.

If the plaintiffs have sufficient interest in the estate to enable them to maintain any action for waste, they shall have judgment for \$ and costs; otherwise, the defendant shall have judgment.

In the second case, the foregoing facts, so far as they were applicable, were also agreed by the parties, and there was a like agreement as to the judgment to be rendered.

The clause in the will of said John Richardson, on which the question in these cases depended, was as follows: "*Seventh.* I give and bequeath to my daughter, Hannah B. Wheatland, wife of George Wheatland, Esq., the East Cambridge Hotel Estate, called the Union Hotel, being all the real estate I own in East Cambridge, to her during her life, and to her husband, George Wheatland, during his life, to be kept in repair out of the income thereof; and at the decease of said Hannah B. Wheatland, and said George Wheatland, to be divided among the heirs of said Hannah; possession to be had in two years after my decease."

These cases were argued at Salem, November 9, 1843, by *Ward*, for the plaintiffs in the first action and for the defendant in the second action, and by *C. P. Curtis*, for the defendant in the first action and for the plaintiff in the second action. The opinion of the Court was delivered at Boston, January 15, 1844.

SHAW, C. J.—Both these are actions of the case in the nature of waste. The first is brought by the sons, and the children of deceased daughters of John Richardson deceased, alleging that they have the next estate of inheritance expectant on the determination of the defendant's life estate, and that they are entitled to recover damages for the alleged waste. The second action is brought by a minor child of the defendant, alleging that he has the next immediate estate of inheritance, and that the right to recover damages is in him; it being admitted that some waste has been done. *Fay v. Brewer*, 3 Pick. 203.

The question is, which of the parties, if either, can maintain the action ; and this depends upon the construction of the seventh clause of the will of John Richardson, under whom all the parties claim. [Here the Judge recited that clause in the will.]

It appears, by the facts agreed, that Mr. and Mrs. Wheatland had no child living at the decease of the testator, they having lost an infant child who was born a short time before the execution of the will, but survived a few days only. Afterwards, in 1839, George Wheatland, Jr., the plaintiff in the second of these actions, was born ; and in 1840, Mrs. Wheatland died.

It is contended by the testator's heirs, that as Mrs. Wheatland had no child living at the time of the death of the testator, and as they insist that it was intended by the testator that the remainder should vest at the same time with the life estates—by the terms “heirs” her brothers, and her sisters' children, her then heirs apparent, take the estate, to the exclusion of her after-born child, who was her heir at her death. This appears to be a very forced construction of the will, and apparently not calculated at all to carry into effect the intent of the testator ; because it would defeat the claims of his daughter's only child and heir at law, contrary to the express terms of the will. Besides, why shall we conclude that it was intended by the testator that the remainder should vest at the same time with the estates for life ? The Courts have often, indeed, said that the law will favor the construction which gives a vested remainder, in preference to that which gives a contingent remainder. This preference, however, is not to be so pressed as to defeat the intent of the testator.

But it is supposed that this devise would have constituted a devise in fee in Mrs. Wheatland, by force of the rule in *Shelley's Case*, and is converted into an estate for life, with remainder to her heirs, by force of the statute of this Commonwealth, limiting and controlling the rule in that case ; and that it is governed by the case of *Bowers v. Porter*, 4 Pick. 198. In *Shelley's Case*, 1 Co. 94, it was held as a rule of the common law, that where there is a devise to one for life, with remainder to his heirs, the latter clause is not a distinct devise, enabling the heirs to take the remainder by purchase, but only serves to qualify and enlarge the estate of the first taker ; to convert what would otherwise have been an estate for life into an estate of inheritance in fee, or in tail, according to the terms of the limitation ; and, as a necessary

consequence, that the first taker might alienate the estate and defeat the heirs.

Where a testator gives an estate to one for life, in terms, with a devise over to the general heirs, or heirs of the body, the natural presumption would seem to be, that the intent of the testator was, that it should be carried into effect literally, and that the first taker should have a life estate only, without power to alienate and defeat the claims of the heirs, who seem to be alike the objects of the testator's bounty. The rule in *Shelley's Case*, therefore, would probably defeat the real intent of the testator. Assuming this to be the case, the legislature of Massachusetts passed an act apparently for the purpose of altering this rule, and directing that a construction should be put upon such a devise, better calculated to carry the testator's intent into effect. It was provided by St. 1791, c. 60, § 3, that such a devise should be construed to vest an estate for life in such devise, and a remainder in fee-simple in such heirs. This provision was reenacted, and extended to lands given by deed as well as by will, by the Rev. Sts., c. 59, § 9. 1 Met. 282. It may perhaps be doubtful whether the present case would come under the rule in *Shelley's Case*, and be governed by this statute; because it is not a devise to one for life, with an immediate remainder to heirs, since there is another life estate intervening. But were it otherwise, and were this governed by the statute, it would seem to be the most natural construction of the statute, and best adapted to accomplish its obvious purpose, viz., that of preventing the first taker from alienating the estate, and of securing the ultimate benefit to the heirs, to hold that those who are heirs of the first taker *at the time of his decease* should take the estate. Then the consequence would be, that the remainder would vest at the moment of the termination of the life estate, so that the same event, which would determine the precedent estate, would fix and ascertain the heirs intended by the statute to take the remainder. And it seems immaterial whether, in any technical classification, it be called a vested or contingent remainder. It is a special estate created by statute, and cannot exist at common law, because the rule in *Shelley's Case*, which our statute obviates here, would prevent it. That this would be a contingent remainder to become vested at the death of the ancestor, is distinctly expressed by Cruise, in his statement of the rule in *Shelley's Case*. Where an estate is conveyed to A. for life, with a remainder to the heirs, or heirs of the body, of A., if the strict con-

struction had been made, according to the strict meaning of the words, A. would have taken only an estate for life, and the word "heirs," or "heirs of the body," of A., would have been considered as words of purchase, giving a contingent remainder to the heirs, or heirs of the body of A. Cruise's Digest, Tit. 32, c. 25, § 1. If, therefore, the effect of our statute is to do away the rule in *Shelley's Case*, and restore the natural construction, then, under this statute, the heirs, as purchasers, take a contingent remainder.

We are then pressed with the authority of *Bowers v. Porter*, 4 Pick. 198, in which it seems to be considered, in such a case, where there are children of the first taker living at the time of the testator's decease, that by "heirs" was intended children, and therefore that the children then living took vested remainders, with the capacity of opening to admit after-born children. One objection to considering it as a vested remainder is, that if such children were to be born or die during the life of the first taker, the estate, at least their share of it, would descend to their heirs, instead of going, according to the express intent of the will, to the heirs of the first taker. Another consequence would be, that such children might alienate their estates during the life of the first taker, and thereby *pro tanto* defeat the intent of the testator to secure the estate to the heirs of the tenant for life. But the case of *Bowers v. Porter* was very distinguishable from the present. There was no intervening life estate; the children were in being at the time of the making of the will and of the decease of the testator; and there was considerable doubt whether the first devise, charged with the payment of a sum of money, was not a devise in fee. But in the present case, it is immaterial whether it is considered as a devise to "children," to become vested as they come into being, or whether the vesting is suspended until the death of the mother; because, as there was no other child born after the death of the testator, and as the minor plaintiff was living at the decease of his mother, he must take the remainder, either way.

One argument drawn from the words of the Rev. Sts., c. 59, before referred to—supposing the statute to apply to the case—it may be proper to consider. The words are, that such "conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee-simple." The argument is that, according to the true construction, it shall vest immediately. But it is quite sufficient to satisfy the words,

to say that it shall vest at such time as will best fulfil the purposes of the statute; that is, immediately on the termination of the particular estate. It will give that direction to the transmission of the estate, which the statute presumes it to have been the intention of the testator to give, to wit, to the first taker for life, and then to his heirs; to those whom the law regards, in the absence of other dispositions by will, as the successors to his estate.

But it seems that the result would be the same, whether this case be considered as coming within the statute or not. According to the rule in *Shelley's Case*, independent of the statute, it would give a life estate to the daughter, remainder to her husband for life, remainder to herself in fee. Her life estate and remainder in fee would not merge, on account of the intervening life estate. But the consequence would be, that her only child and heir at law would take the remainder in fee, by descent.

If, however, the case comes under the statute, it is a devise to the daughter for life, remainder to her husband for life, remainder to the heirs of the daughter. This being a *designatio personarum*, they would take as purchasers, under that designation. But as *nemo est hæres viventis*, no one could come within the description until the death of the first taker. It would then be a contingent remainder, coming under the fourth head, as classified by Mr. Fearne, where the person to whom the remainder is limited is not yet ascertained, or not yet in being. Fearne, (7th ed.) 5, 9. But this would vest in the child *eo instanti* with the decease of the mother, ascertaining her heir, and terminating her life estate.

But suppose the word "heirs" in this devise should be construed to mean children—and possibly such was the sense in which the testator used it—then if any one or more were living at the time of the death of the testator, such one or more would take a vested remainder; otherwise, the first one who should be born afterwards would take a remainder vested when it should come into existence, liable to open for the admission of after-born children, if any. Still, as the child of Mrs. Wheatland was the only one born, if the remainder became vested in him at his birth, it still remains vested in him, and he has the next expectant estate of inheritance.

If this could be construed to be an executory devise—which we are of opinion it cannot, because it is to take effect immediately on the

determination of the particular estate—still, as between these parties, the result would be the same.

In any possible aspect in which we can consider the subject, the Court are of opinion that the child of Mrs. Wheatland, and not her collateral heirs, was entitled to this estate; that this child has now a vested remainder expectant on the termination of the father's life estate, and, having the next immediate estate of inheritance, is entitled to maintain this action. It follows as a necessary consequence that the collateral relations of Mrs. Wheatland, who would have been her heirs but for the birth of this child, have not any estate of inheritance, and cannot maintain their action for waste. In the second action, judgment is to be entered for the plaintiff.

A contingent remainder is defined by Fearné as a remainder limited so as to depend on an event or a condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate, Fearné Cont. Rem., p. 3; and see 4 Kent's Com. 206. According to another definition, a contingent remainder is where either the person to whom, or the event upon which, the future estate, limited upon a precedent estate, is to be enjoyed is at present uncertain. See Judge SHARSWOOD's note to Blackst. Com., Lib. 2, p. 163.

Characteristic of Contingent Remainder. Uncertainty of Right.

The distinguishing characteristic of a contingent remainder, it is agreed by the authorities, is the uncertainty of the remainder as to right, and not the uncertainty or improbability that the land will ever come into the possession of the remainderman, 4 Kent's Com. 206; 1 Preston on Estates 71, 74, and cases cited *supra*, on page 281.

According to Williams, Real Property 264, there is no instance of a contingent remainder having been upheld as valid prior to the reign of Henry VI., the attempt to create such estate being then regarded as a violation of the simplicity of the rules of the common law; and there is the authority of Littleton, § 721, to the effect that every remainder which beginneth by deed must be in him to whom it is limited before livery of seizin is made to him who is to have the immediate freehold; but by the time of *Boraston's Case*, 29 Eliz., reported in 3 Co. 19 a, contingent remain-

ders seem to have been fully recognized as valid and effectual limitations of property.

Classes of Contingent Remainders.

Blackstone divides contingent remainders into two classes: First, those limited to a dubious and uncertain person; second, those limited to a fixed and certain person, but upon a vague and uncertain event, Blackst. Com., Lib. 2, pp. 169, 170.

Fearne, Cont. Rem. p. 5, *et seq.*, makes a more elaborate division and recognizes four classes, as follows:

1. Where the remainder depends entirely on a contingent determination of the particular estate itself.

2. Where some uncertain event unconnected with and collateral to the determination of the preceding estate is, by the nature of the limitation, to precede the remainder.

3. Where a remainder is limited to take effect upon an event, which though it certainly must happen some time or other yet may not happen until after the determination of the particular estate.

4. Where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made.

Remarks upon Remainders of Fearne's First Class.

As to remainders of the first class, Fearne remarks that, though at first sight they may seem to be rather conditional limitations than remainders, yet they are really contingent remainders in the strict technical sense, and proceeds to demonstrate the proposition and to state the distinction between remainders and conditional limitations, as follows: "The former are limited to commence when the first estate is by the very nature and extent of its original limitation to expire or determine, whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate and to take effect in possession upon an event which may happen before the regular determination to which that first estate is liable from the nature of its original limitation and so as to rescind it."

This view of Fearne is supported by the remarks of BIGELOW, J., in the church in *Brattle Square v. Grant*, 3 Gray 142 (*ante*, Vol. I., p. 168). "The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event and not in abridgment of it; thus, a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate

and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee, constitutes a valid remainder, because the particular estate not being a fee is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs until C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate being an estate in fee is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is, that when the event which gives birth to the ulterior limitation determines and breaks off the preceding estate before its natural termination or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate."

Exception from Third Class.

From the third class of contingent remainders above mentioned must be excepted the case of a limitation to a person of a term of years, if he shall so long live, or if a person in being at the time of the creation of the estate shall so long live, with remainder, on the death of the said person, to one *in esse*, and the term of years is so long that the particular tenant cannot, by common possibility, outlive it; see *Fearne Cont. Rem.*, p. 20; for as we have already seen, *supra*, p. 290, the contingency which prevents a remainder from being a vested one must be a real contingency, and not one merely so in appearance by virtue of a form of expression; and in such a case the remainder will be considered a vested one after a life estate. In *Napper v. Sanders*, Hutt. 118, the term of eighty years was in the case of a grown person considered to be a term beyond the common possibility; and in *Weale v. Lower*, Pollexf. 67, Sir MATTHEW HALE said that if a feoffment were made to the use of A. for ninety-nine years, if he should so long live, and after his death to the use of B. in fee, the remainder would not be a contingent one; but added that it would be otherwise in case the period named were twenty-one years.

Exception from Fourth Class.

From the fourth class of contingent remainders must be excepted those cases which fall within the rule in *Shelley's case*. This subject will be found treated in a separate note.

Apparent Exception.

Fearne likewise makes another exception, namely, cases in which a devise to the heir special of a person in being has been held a sufficient designation of the person who would take in case of the immediate termination of the precedent estate, notwithstanding the general rule, *nemo est haeres viventis*, Fearne Cont. Rem., p. 209. This exception, however, would seem to rest on a verbal distinction only, for if the word "heir" is used in the devise in the sense of heir presumptive, and the intent of the devisor when the will takes effect is apparent that the person who *then* fills that position shall take, the use of the word "heir" would be certainly a mere *designatio personem*, and the gift could hardly be said to be to an "heir" at all.

Rules Governing Creation of Contingent Remainder. When Contingent Remainder is Freehold, the Particular Estate must be a Freehold.

The contingency upon which the remainder can be limited may be any event which would fall within the classes above mentioned. The following rules, however, must be observed in the creation of a contingent remainder.

First. A contingent remainder of a freehold must be limited on a particular estate which is itself a freehold; for the particular estate and the remainder must be created at the same time, and unless the freehold passes out of the grantor at the time the remainder is created it is a void remainder; if it pass out of the grantor it must vest somewhere, and by the very quality of a contingent remainder it cannot vest in the remainderman, 1 Co. 130; Black. Com., Lib. 2, 171; Fearne Cont. Rem. 281; 4 Kent's Com. 236; it is true that this doctrine, that the freehold will not at common law be permitted to be *in nubibus*, has been disputed; see *Bohon v. Bohon*, 78 Ky. 408; but the weight of authority seems to support it.

The rule applies equally to limitations by way of use as to direct conveyances or devises, Fearne Cont. Rem. 284; 4 Kent's Com. 236.

This rule does not apply to contingent remainders for years; for, as such a remainder is not a freehold, there is no apparent necessity that a freehold should pass out of the grantor to support it, Fearne Cont. Rem., p. 284; 4 Kent's Com. 237.

It is not necessary, in order to sustain the remainder, that the particular estate continue until its natural determination in the actual seizin of the rightful tenant; it is sufficient that he have a right of entry, Fearne Cont. Rem., p. 285.

The above rule, of course, does not apply in those States which have by

statute abolished the necessity of a particular estate to support a remainder ; see the statutes of New York, Michigan, Minnesota, Wisconsin, Texas, Virginia, West Virginia, Kentucky, Georgia, referred to, *supra*, on pages 278, 279.

The Contingency must be a Lawful Act.

Second. The contingency upon which the remainder is limited must be a lawful act, "for," says Lord COKE, in *Cholmly's Case*, 2 Co. 51 b, "the law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law ; for it is *potentia remotissima et vana* which by intendment of law *nunquam venit in actum*."

The examples of illegal contingencies given by Fearné, p. 249, are the possibility of a man's entering into religion by becoming professed, and a limitation to a bastard not *in esse*. The first contingency, it is thought, would hardly fall under the head of illegality in the United States. As to the second, Blackstone goes further than Fearné (although the former puts it rather on the ground of remoteness, while Fearné says, "For the law does not favor such generation or expect that such should be"), and declares the limitation to a bastard before it is born is not good, Lib. 2, p. 170 ; but this statement of the law has been very much limited by the authorities. Blackstone rests upon *Blodwell v. Edwards*, Cro. Eliz. 509, the reports of which Chitty, note to Blackstone *ad loc.*, remarks are discordant. Upon this subject, Lord COKE says : "So it is if a man make a lease for life to B., the remainder to the eldest issue male of B. to be begotten of the body of Jane S., whether the same issue be legitimate or illegitimate. B. had issue, a bastard, on the body of Jane S. This son or issue shall not take the remainder ; for (as it hath been said) by the name of issue, if there had been no other words, he could not take ; and (as it hath been also said) a bastard cannot take but after he hath gained a name by reputation ; that he is the son of B., etc. ; and therefore he can take no remainder limited before he be born," Co. Lit. 3 a. This authority, which certainly sustains Blackstone's position, is strengthened by the dictum of PARKER, L. K., in *Metham v. Duke of Devon*, 1 P. Wms. 530, that he inclined to the opinion that a natural child, *en ventre sa mere*, could not take under a bequest to all the natural children of a married man by a certain woman ; and in *Earle v. Wilson*, 17 Ves. 531, Sir WM. GRANT, M. R., followed the authority of Coke and Macclesfield, and stated the rule to be that a bastard could not take as *the issue of a particular man* until it had acquired the reputation of being the child of that man. It will be noted that all these statements of the law seem to go upon the uncertainty, legal if not actual, of the paternity of the bastard *en ventre*, and not upon the

remoteness of the possibility of a person's having bastard issue, or the illegality of the begetting of such, and, therefore, where the element of uncertainty is not introduced, but where a woman being *enceinte* of an illegitimate child, a contingent remainder is given to *such* child, without any specification of its supposed paternity, in terms which leave no doubt as to the child meant, such a remainder will, it is thought, be good. See *Gordon v. Gordon*, 1 Meriv. 142; *Evans v. Massey*, 8 Price 22; *In re Connor*, 2 J. & L. 460; *Pratt v. Mathew*, 22 Beav. 339. The old rule, that a gift to a future illegitimate child is void has been even farther relaxed; and the principle has been established in England that a gift by a testator to a person not *in esse*, described therein as his child, by a person to whom he is not married, if before the testator's death the child is born and acquires the reputation of being the testator's child, will be a valid gift. See *Occleston v. Fullalove*, L. R. 9 Ch. App. 147; *In re Goodwin's Trust*, L. R. 17 Eq. 345. It may be noted, however, that in both these cases the form of marriage had been gone through between a man and his deceased wife's sister; and hence that the uncertainty of parentage was theoretical merely—a fact which may have induced the Court to strain a point to uphold the gift; and whatever may be thought of the proposition as a general statement of the law governing bequests or gifts by testators to future illegitimate children, there can be no doubt of its working substantial justice in the cases to which it was applied. As to its general advisability there may be some more doubt, since, by the principle of it, a contingent remainder might be made to illegitimate children not even in embryo, if they should happen to be born and live long enough to obtain the reputation of being the grantor's children. This might undoubtedly have the effect of increasing a practice *contra bonos mores*; and one can readily see the difference between permitting a provision for the support of the innocent result of past sin and removing beforehand one of the restraints upon the commission of a similar offence.

In *Zeisweiss v. James*, 63 Pa. 465, SHARSWOOD, J., in delivering the opinion of the Court, intimated that a remainder to a society to be formed for the purpose of disseminating infidel doctrines would not be upheld. The case, however, was decided on another point, and the admirable remarks of the learned Judge on pp. 470 and 471 must be regarded as *obiter dicta*.

Remainder must not be Limited after a Contingency which would make a Too Remote Limitation.

Third. The remainder must not be limited after a contingency which would make a too remote limitation. A distinction must be taken between a too remote contingency, of which we have examples below, and a remote

limitation, since the rule of perpetuities, which governs in the cases of executory devises, does not apply in the case of contingent remainders. This was authoritatively announced by Lord ST. LEONARDS, when, as Sir EDWARD SUGDEN, he was Lord Chancellor of Ireland, in the case of *Cole v. Sewell*, 2 Con. & Laws 344, affirmed in 21 H. of L. Cas. 186. In that case his Lordship said: "I apprehend it is quite settled that if the limitation be a remainder remoteness is out of the question. The remainder is either vested, and then, of course, there is no remoteness, as the vesting has already taken place; or the remainder is contingent, and if so, no matter how remote may be the contingency until the happening of which the vesting is deferred, still, by the rules of law, if it does not happen so that the remainder may vest on the termination of the particular estate, it cannot take effect at all. . . . If the limitation be a springing or shifting use or executory devise, and does or may go beyond the limits of perpetuities, it is void; but if it be a contingent remainder, there is no such rule; the contingent remainder may no doubt be so remote as not to take effect, but mere remoteness is no objection—that doctrine can never be brought to bear against the validity of a contingent remainder." In addition to the general reason given by Lord ST. LEONARDS for the non-application of the rule of perpetuities to contingent remainders, there is to be found, where the limitation over is after an estate tail, an additional reason why such limitation should not be held void for remoteness, in the ability of the tenant in tail to bar the entail and thereby to destroy the contingent remainders depending thereon, *Taylor v. Taylor*, 63 Pa. St. 481. The opinion of Lord ST. LEONARDS has not, however, escaped criticism. Mr. Tudor, in his note to *Cadell v. Palmer*, Tudor's Lead. Cases on Real Prop., remarks that the necessity that a contingent remainder should take effect immediately upon the determination of the particular estate does not in all cases render the rule against perpetuities inapplicable to the case of contingent remainders. But Mr. Tudor does not, as Jarman (Jarman on Wills, Vol. I., p. 258) does, take into consideration the distinction noted above between the remoteness of the limitation and the remoteness of the contingency. On this side of the Atlantic, BELLOWS, J., in *Wood v. Griffin*, 46 N. H. 230, has maintained, with considerable force—although the case was decided without affirming the position as law—that the rule of perpetuities should be applied to contingent remainders; the learned Judge said: "But this [*i. e.*, the necessity of vesting on the determination of the particular estate], we apprehend, would be no safeguard against remoteness, because, if the rule does not apply to remainders, a succession of particular estates may be limited to unborn persons, and in this way be followed for many generations, so long, in

fact, that is as the persons to whom the estates were so limited came into being to take the estates at the termination of the preceding particular estates, and this it is quite clear would be in conflict with the policy which has dictated the rule in respect to perpetuities, for the principle of that rule applies to contingent remainders equally with springing and shifting uses and executory devises.

"Indeed, it would seem to be clear that the same principle in substance was applied to contingent remainders at an early period, long before the institution of springing uses and executory devises, Co. Litt. 271, 6; Butler's Note 5; *Seaward v. Willock*, 5 East 196; 2 Jar. on Wills 226; Lewis on Perpetuities 495."

It is thought that the criticisms upon Lord St. LEONARDS' statement have had their origin in a neglect of the distinction to which we have above alluded, and that Mr. Jarman's examination of the case of *Cole v. Sewell* shows the correctness of his Lordship's views. Jarman says: "The judgment . . . has been criticised as if it had asserted that contingent remainders were in no case subject to the rule against perpetuities being sufficiently restricted by the rule which requires them to vest, if at all, at or before the determination of the particular estate. But this does not seem to have been his real meaning. He nowhere says that the event upon which the preceding particular estate (upon which the contingent remainder is to depend) is limited to *determine* need not be within the limits allowed by the rule. On the contrary, he says 'the modern rule against perpetuities has rendered void successive life estates to successive unborn classes of issue,' and (as he has since remarked) he relied on the previous estate tail. The rule here referred to prevents the existence of a particular estate which, by enduring to a too remote period, might support a too remote contingent remainder; while in the case before him the estate tail removed all question of perpetuity. The event upon which the particular estate is to determine need not be, and in *Cole v. Sewell* was not, the same as the event upon which the contingent remainder is to arise; and the Lord Chancellor's judgment is directed only to show that where the former event is not obnoxious to the rule against perpetuity the remoteness of the latter event is immaterial," Jarman on Wills, Vol. I., p. 258.

Limitation after Indefinite Failure of Issue.

A common example of a too remote contingency is where there is a limitation over after an indefinite failure of issue, *Macomb v. Miller*, 9 Paige 265; S. C. 26 Wend. 229; *Riddick v. Cohoon*, 4 Rand. 547; *Huxford v. Milligan*, 50 Ind. 542. In support of the intention of the deviser or grantor

the general rule of law is that, wherever a limitation over on failure of issue can be construed as on a definite failure, without doing violence to the words of the will or deed containing the limitation, such construction will be sustained; see *Clapp v. Fogleman*, 1 Dev. & Bat. Eq. 466. This is contrary to the English rule as it existed prior to the statute of 1 Vict., c. 26, § 29; see *Baehm v. Clarke*, 9 Ves. 580; *Doe d. Jones v. Owens*, 1 Barn. & Ad. 318; *Barlow v. Salter*, 17 Ves. 479; *Cole v. Goble*, 13 C. B. 445; *Newton v. Bernardine*, Moore 127; Tudor's Lead. Cas. in Real Prop. 686; but is believed to be the general American rule, in view of our policy with reference to freedom of alienation and the rule which requires that interpretation to be given to an instrument which will uphold rather than that which would destroy it, and its spirit has been grafted into the legislation of several of the States; thus, in Kentucky, it is established by statute that unless a different intent be plainly expressed, every limitation made contingent upon a person dying "without heirs," or "without children," or "without issue," or expressed by words of like import, must be construed to take effect when such person shall die, unless the object on which the contingency is made to depend shall be then living, or a child of his body shall be born within ten months thereafter, Gen. Stat. (Bull. & Fel.), Ch. 63, Art. I., § 9, p. 586; to the same effect are the statutes of Mississippi, Rev. Code (1880), § 1203, p. 347; North Carolina, Bat. Rev., Ch. 42, § 3, p. 383; Tennessee, Stats. (1871), § 2009, p. 938; Virginia, Code, Ch. 112, § 10, p. 889; West Virginia, Rev. Stat., Ch. 82, § 10, p. 553; Maryland, Rev. Code (1878), Art. 49, § 9, p. 420.

In South Carolina, in the absence of a manifest contrary intent, provision for a failure of issue is to be taken as on a definite failure, Gen. Stat. (1882), § 2275, p. 649.

By the New York Revised Statutes, it is provided that where a remainder shall be limited to take effect on the death of any person without heirs of the body or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 2, § 22, p. 2177. The same is the law also in Michigan, Howell's Ann'd Stat., § 5538, p. 1443; Minnesota, Rev. St., Ch. XLV., § 22, p. 562; Alabama, Code, § 2181; p. 571; Wisconsin, Rev. St., § 2046, p. 615; Missouri, Rev. St., § 3942, p. 675; *State ex rel. Haines v. Tolson*, 73 Mo. 320. Prior to the Revised Statutes the common law rule which interpreted the words "dying without issue" to mean *per se* an indefinite failure had been recognized in New York, *Wilkes v. Lion*, 2 Cow. 333.

Limitation to Issue of Unborn Issue.

Another example of a too remote limitation is where the limitation is to the issue of unborn issue, *Jackson ex d. Nicoll v. Brown*, 13 Wend. 437; *Allyn v. Mather*, 9 Conn. 114; *Williams Real Prop.* 274.

Remainder to Corporation not in Being.

A remainder to a corporation not in being has been held too remote, *Cholmley's Case*, 2 Co. 51 a; *Zeisweiss v. James*, 63 Pa. St. 465; but in New England devises of remainders for the use of unformed parishes or congregations have been upheld as valid; see *Proprietors of the Town of Shapleigh v. Pilsbury*, 1 Me. 271.

Possibility upon a Possibility.

According to Coke, where there is a possibility upon a possibility, *i. e.*, where there is a requirement of the concurrence of two contingencies, as where there is a limitation in remainder to the right heirs of J. S., and there is no such person as J. S. in being, the limitation is void as being too remote, and from this came the rule that a remainder limited on a possibility on a possibility was void. This rule was applied in *Zeisweiss v. James*, 63 Pa. St. 465, as follows: There was a devise in remainder to a society to be incorporated and to be known as the Infidel Society, for the purpose of building a hall for the free discussion of religion. At the time of the devise there was no general act of Assembly under which such an association could be incorporated. The life tenants under the will, one of whom was the heir-at-law of the testator, entered into a contract to convey to Zeisweiss the real estate devised, and a case was stated for the opinion of the Supreme Court to determine whether the vendors could make a good title in fee to the land. One of the questions involved, and the one upon which the case finally turned, was the validity of the remainder to the Infidel Society. THOMPSON, C. J., before whom the case came at *nisi prius*, entered judgment for the vendors. On the case being certified to the Court in banc, SHARSWOOD, J., in delivering the opinion of the Court, said: "It is highly improbable that the Legislature will ever incorporate, or authorize the incorporation of, such an association. Supposing it, however, to be possible, it is *potentia remota*—that a corporation should be created and with that name—a possibility upon a possibility, which, as Lord COKE tells us, is never admitted by intendment of law, Co. Litt. 256, 184 a. It is like a remainder to the heirs of a person unborn—that a person should be born and die during the continuance of the particular estate—as to an unborn

son of a particular name, Fearne 251." And the Court held that the remainder being void the heir-at-law could make a good title in fee. But in *Miller v. Chittenden*, 4 Iowa 252, there was a deed to certain persons for the use of a Congregational Church in Keokuk, to be named and called the Congregational Church of Keokuk. At the date of the deed there was no Congregational church in Keokuk, nor any associated body of persons to whom the grantor could have intended to refer; both of these facts were urged as showing the grant void, but the Court upheld the grant, saying, after citing *Shapleigh v. Pillsbury*, 1 Me. 271; *Rice v. Osgood*, 9 Mass. 38; *Reformed Dutch Church v. Veeder*, 4 Wend. 494; and *Town of Paulet v. Clark*, 9 Cr. 292: "In these cases it has been held, that if the lands are granted for pious uses to a person or corporation not *in esse*, the right to the custody and possession remains in the grantor until the person or corporation intended shall become *in esse*; if to individuals for the use of a corporation not *in esse*, then the grantors stand seized to the use, and when the church receives legal capacity the statute executes the use." This, although the case of a springing use rather than a strict remainder, may be regarded as a case of a possibility upon a possibility, the erection of a corporation to be called by a certain name. It is worthy of note, however, that the opinion of the Court confines the operation of the rule it lays down to grants to pious uses, and so the case may fall within the list of those of which *Rice v. Osgood*, 9 Mass. 38, is a type.

This rule, as stated by Lord COKE, is thought by Williams, *Real Property*, p. 274, to rest solely on the reverence due to that great legal sage, and he regards it as overthrown by later authorities; he, however, admits its application in one case, and states the law to be that an estate cannot be limited to an unborn child with a remainder to a child of such child; but this position he regards as an independent rule of general application; see Williams, *Real Prop.* 264 (9th ed.), and Appendix F. Judge SHARSWOOD, however, in *Zeisweiss v. Jones*, regards the rule as still law, and see *Dennett v. Dennett*, 40 N. H. 498.

Addition of Condition to Devise Over on Definite Failure of Issue.

It may be noted that it seems that the mere addition, to a devise over on a definite failure of issue, of a condition to be performed, will not, *per se*, render said devise void for remoteness. Thus in *Warner v. Mason et ux.*, 5 Munf. 242, there was a devise to W. for life, with remainder to the lawful heirs of his body "born at the time of his death or nine calendar months after, and for want of such heirs to J. and G., one of them to set a price on the whole of it, and give or receive one-half of that

sum from the other." It was contended in argument that the remainder was void for remoteness, but the Court held otherwise, apparently without giving any reasons for its judgment, for no opinion is reported.

Effect of Statutory Limitation of Time for Vesting in Possession Contingent Remainder.

As we have seen above, the common law rule as to perpetuities does not apply to contingent remainders; but a statutory limitation of the time within which a remainder must vest in possession has been introduced into many of the States.

Where a statutory time is fixed within which a remainder must vest in possession, and a remainder is so limited that the contingency upon which it depends *may* not happen until after the prescribed time has expired, the remainder will be held void for remoteness; thus, in *Brattleboro v. Mead*, 43 Vt. 556, land was devised "to my son, T. Z. D., to have and to hold, to him and his lineal heirs and assignees forever; provided, if said T. Z. D. shall die without lineal heirs, or upon failure of his and my lineal heirs," the land should be given for the establishment of a school. By force of the statute in Vermont, the estate given to T. Z. D. was a life estate, with remainder to his issue; the Court held that the case was that of a devise over after an indefinite failure of issue, and held the contingent remainder void, saying: "The contingency may happen after the legally required period, *i. e.*, a life or lives, and twenty-one years and a fraction for gestation after."

But where a construction of an instrument can be made which will be agreeable to the phraseology thereof without violating the Statute of Perpetuities, that construction will be adopted rather than one which would cause such a violation. Thus, in *Rand v. Butler*, 48 Conn. 293, there was a devise in trust for the support of one B., with the further provision that on the decease of B. "then the said trustees are to deliver and transfer the said land and house to my heirs at law, and their heirs and assigns forever;" it was held that B. was not to be excluded in computing the heirs of the testator, since otherwise the Statute of Perpetuities, which ordained that no estate should be granted but to such as were at the time of the gift in being, or their immediate issue or descendants, would have been violated.

Under the statutory limitations in Indiana, there can be no suspension of the absolute power of alienation of land by any limitation or condition whatever for a longer period than during the lives of any number of persons in being at the creation of the estate conveyed or devised, with the exception that a contingent remainder in fee may be created on a prior re-

mainder in fee in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before he or they attain full age, Rev. Stat. (1881), § 2962, p. 588. The same rule is enacted, with the addition of the limitation of the number of lives to two, in California, Civil Code, §§ 5715, 5772, pp. 680, 684; Michigan, Howell's Ann'd Stat., § 5531, p. 1442; New York, Rev. Stat. (1882), Pt. 2, Ch. 1, Tit. 2, §§ 15, 16, p. 2176; Minnesota, Gen. Stat., Ch. XLV., §§ 15, 16, pp. 561, 562; Wisconsin, Rev. Stat., § 2033, p. 614; an exception is made in the statute of the last named State in favor of gifts to charities and literary institutions. In New York, it is also provided that no contingent remainder shall be limited upon a term of years unless the contingency is such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of the remainder, or at the termination of such lives, Rev. St., Pt. 2, Ch. 1, Tit. 2, § 20, p. 2165. The same is the law in Michigan, Howell's Ann'd Stat., § 5536, p. 1443; Minnesota, Gen. St., Ch. XLV., § 20, p. 562; Wisconsin, Rev. St., § 2044, p. 615. Under this statute a trust was made for years with contingent remainders for life to seven children and two grandchildren, if they should survive the estate for years, and become entitled by the happening of the contingency with a power to appoint a remainder in fee, and to substitute remainders as to the shares of such of the original remaindermen as should die during the trust term. WALWORTH, Ch., held that the first limited remainders were valid, but the substituted ones were not, for they would not necessarily vest during the continuance or at the termination of any two lives in being at the death of the testator. The decree of the Chancellor as to the first remainders was reversed by the Court of Errors, and all the remainders were declared invalid, *Hawley v. James*, 5 Paige 318, S. C. 16 Wend. 61. In Iowa, the statute avoids every disposition of property which suspends the absolute power of controlling the same for a longer period than the lives of persons in being and for twenty-one years thereafter, 1 McClain's Ann'd Stat., § 1920, p. 541. In Georgia, a limitation may be made to extend through any number of lives in being when the limitation commences, and for twenty-one years and the period of gestation afterwards, Code, § 2267, p. 556.

In Connecticut, the statute provides that no estate in fee-simple, fee-tail, or less estate, shall be given by deed or will to any person but such as are at the time of making such deed or will in being, or to their immediate issue or descendants, Gen. St. (1875), T. 18, Ch. VI., Pt. 1, § 3, p. 352.

In Maryland, the statute provides that no will shall be effective to create a perpetuity, Rev. Code (1878), Art. 49, § 2, p. 419. In *Heald v. Heald*,

56 Md. 300, there was a devise of an equitable life estate to C., with remainder to his children living at the time of his death; on their death without issue, then in trust for the survivors; on their death leaving issue, then to their issue; the limitation over to the last-mentioned issue was held a violation of the statute.

Contingency must not be Repugnant to a Rule of Law, Contrariant in Itself or Inconsistent with Preceding Estate.

Fourth. A fourth rule is also given, viz., the contingency on which the remainder is limited must not be repugnant to a rule of law, or contrariant in itself, or inconsistent with the quality or nature of the preceding estate, *Fearne Cont. Rem.*, p. 248. Under this head will fall all cases where there is an attempt to limit the remainder upon a contingency which will abridge the period of the preceding estate (see *supra*, p. 269), and also where there is an attempt to deprive such estate of any quality necessarily connected with it, as a limitation to A. in tail, with remainder to B., with the provision that if the tenant in tail attempt by a common recovery to bar the entail or the remainder, the estate shall cease as though the tenant in tail were dead, without heirs of the body; or where a remainder is given after an absolute power of control and disposal is given to the particular tenant. See *Ide v. Ide*, 5 Mass. 500; *Weir v. Michigan Stone Co.*, 44 Mich. 506; but this latter instance would hardly be an apt illustration in those States where a limitation over after a fee is permitted.

Illustrations of Contingencies.

Bearing these rules in mind we may consider some of the more common contingencies, as illustrated by decided cases.

A very common class of contingent remainders is where by deed or devise there is a limitation in remainder to one who survives a certain person or event, or to a person who shall be alive at a certain time, where the time is fixed and the only uncertainty is with reference to the person, or where the person and the time of the event are both uncertain. Thus in *Thomson v. Ludington*, 104 Mass. 193, there was a devise to a widow *durante viduitate*, and on her death or marriage to "such of my [the testator's] children as shall then be living, the names of my children are . . . to them and their heirs." One of the children, B., died before the death or marriage of the widow, and left a child; it was held that the remainder to B. was contingent upon his surviving the death or marriage of the widow, and hence that B.'s child took nothing.

In *Faber v. Police*, 10 S. C. 376, there was a deed in trust for the use of J. L. Faber for life, and immediately after his death for his lawful issue living at the time of his death; the expression living at the time of his death was held to raise a contingency of survivorship.

In *Ex parte C. H. Miller*, 90 N. C. 625, there was a devise to E. A. for life, "remainder to such children as she may leave her surviving, and those representing the interest of any that may die leaving children." The remainders in this case were held contingent, the Court citing *Williams v. Hassell*, 73 N. C. 174, S. C. 74 Id. 434. At first sight, the provision for representation in this case would seem to show an intention to give vested remainders, but it is to be observed that the representation provided for was only of those who might die *leaving children*, and that the general or collateral heirs of children of E. A. who might die childless were not included in the provision.

In *Emison v. Whittlesey*, 55 Mo. 254, there was a deed to M. V. S. for life, and upon the death of the said M. V. S. the remainder in fee-simple "to vest in the children of M. V. S. and W. H. S. *then living*, and in the children of any of their children who may die before M. V. S.'s death." The Court held the remainder contingent, saying: "At the time of the deed it was impossible to say that any one was in existence who would take the remainder. No one could tell that any of the children would survive the mother."

In *Stephens v. Evans's Admin'r*, 30 Ind. 39, there was a trust for C. and his family during life, and in the event of the death of C., leaving his wife to survive him, then during her widowhood for the benefit of the widow and children surviving C., and upon the death or marriage of the widow, "thereupon, instantly, and thenceforth," the land "shall descend, go to, and become the absolute property of the children [of C.] living at the happening of such contingency, and such others of his children as may hereafter be born, and to the children of any deceased child of his in equal proportions." The remainder was held contingent notwithstanding the recognition of the deceased children's children, and the provision for them—the Court distinguished the case from *Womrath v. M' Cormick*, 51 Pa. St. 504, on the ground that in the latter case all the devisees in remainder were *in esse*, and further said that in the instrument before it, "it was the vesting of the estate, and not the division of the property, which was referred to and embraced in the words thereupon, instantly, and thenceforth."

In *Bailey v. Hoppin*, 12 R. I. 560, there was a conveyance in trust to apply the income to the use of the grantor's wife during life, and after her death to the use of the grantor, and on the decease of both of them to convey to such of their children "who shall be living at the decease of the

survivor and such issue then living of any children who may be then deceased." It was held that the remainders to the children and issue were contingent.

In *Wylie v. Lockwood*, 86 N. Y. 291, there was a devise in trust, which provided that on the coming of age of the youngest child of the testator the estate should go "to my said children, or such of them as may be then living, to have and to hold as tenants in common for their respective lives." The will continued: "And I order and direct that in case any or either of my children should die without issue, his, her, or their share shall go to the survivor or survivors of them living at the time of such death, respectively, without issue, equally during their respective lives; and after his, her, or their deaths to their issue, respectively, in fee-simple. On the death of either of my said children leaving issue, I give and devise to such issue and to their heirs and assigns forever the share or proportion of my estate hereinbefore devised for life to the parent of such issue." The testator left three sons and five daughters. All of the sons died unmarried and intestate before the youngest child attained the age of twenty-one, which event occurred in 1843. The five daughters took the life estates. One of them, Emelia, died in 1850, leaving two children, the plaintiff and another, who was dead at the time the action was brought; another, Frances, died intestate, unmarried and without issue, in 1864. The question before the Court was whether the plaintiff had any interest in the share of Frances under the will; it was held by the Court of Appeals, reversing the decision of the Supreme Court in 20 Hun 377, that she had not, since her mother, Emelia, never had but a contingent remainder in Frances's share, which remainder never became vested.

In *Smith v. Rice*, 130 Mass. 441, there was a trust for certain persons for life, and at the expiration of the life estates the trustees were by the terms of the trust to convey to E. H. W., S. W., S. H. W., Jr., children of O. H. W., and such other children of S. H. W. as shall then be living. The remainder was held contingent even as to the children named, all being regarded as a class; and see also *Dehon v. Redfern's*, Dud. Eq. 118; *Redfern v. Middleton*, Rice 459; *Sanford v. Sanford*, 58 Ga. 259; *White v. Rowland*, 67 Id. 546; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Bayless v. Prescott*, 79 Ky. 352; *Grier v. McAfee*, 82 N. C. 187; *Brown v. Williams*, 5 R. I. 309; *City of Peoria v. Darst*, 101 Ill. 609; *Bowman v. Lobe*, 14 Rich. Eq. 271; *Jones v. Waters*, 17 Mo. 589; *Blanchard v. Blanchard*, 1 Allen 226; *Hannon v. Christopher*, 34 N. J. Eq. 459.

Limitation to Oldest Son Living at Time of Death of Ancestor.

A remainder to the oldest son of the life tenant who may be living at the time of his death is a contingent remainder, *Robertson v. Wilson*, 38 N. H. 48; *Wendell v. Crandall*, 2 Den. 9, S. C. 1 Comst. 491.

In *Allyn v. Mather*, 9 Conn. 114, land was given for life to two grandsons of the testator, and after their decease to the eldest son of each, lawfully begotten, and so from eldest son forever; the Court held the remainder a contingent one to the sons answering the description of eldest at the time of their respective fathers' deaths. DAGGETT, J., however, dissented, and regarded the remainders as vesting in the *primogenitii*, even if they died in the lifetime of their fathers.

Limitation to Survivor.

While, as we have seen, *ante*, p. 297, general words of survivorship will in many States be referred, if possible, to the death of the testator, thereby creating a vested remainder, yet wherever the survivorship is unmistakably referred to the death of some person other than the testator, a contingent remainder will be given. See *In the Matter of Ryder*, 11 Paige 185.

In *Hulburt v. Emerson*, 16 Mass. 241, there was a devise to John Emerson in fee, "but in case he should leave no male issue, one-half to his children and one-half to my [the testator's] surviving children." The Court held the devise to be in tail male general, with a contingent remainder to those children of the testator who were living at the time of the death of John Emerson. This case has, however, been slightly treated in its own State, as unsupported by any cited authority, and as unsustained by any reasoning of the Court, so that it can hardly be considered as of any weighty authority; see *Blanchard v. Blanchard*, 1 Allen 223.

Limitation to Unborn Issue of Persons Named.

A contingent remainder is often made to unborn children of persons named; thus, in *Loring v. Elliot*, 16 Gray 574, a marriage settlement created a trust for the use of the settler during her life, and provided that on her death the trustees should convey the remaining property to her children if she should leave any; it was held that the children took a contingent remainder, and see also *Hildreth v. Eliot*, 8 Pick. 297; and see *Williamson v. Field*, 2 Sand. Ch. 533; *Cooper v. Hepburn*, 15 Gratt. 551.

Remainder to "Heirs."

A devise or conveyance with remainder to the heirs of a particular person necessarily creates a contingent remainder, for *nemo est haeres viventis*, and until the death of the person named as the ancestor, it is impossible to say who is the heir, *Richardson v. Wheatland*, 7 Metc. 169; *Bennett v. Morris*, 5 Rawle 9; *Sharman v. Jackson*, 30 Ga. 224; *Wood's Appeal*, 18 Pa. St. 478; *Reid v. Stuarts*, 13 W. Va. 338; *Stehman v. Stehman*, 1 Watts 466; exceptions to the rule are found where the words "heir" and "heirs" are used simply as *descriptio personarum*, or where the limitation is to the heirs of the testator himself, *supra*, p. 295; although we have seen that this exception has not always been maintained, see *Hall v. Want*, Philips N. C. Law 502 (cited *supra*, p. 295), but this case can hardly be considered as breaking the force of the exception.

As a rule, the word "heir," as is well stated by DUFFEE, C. J., in *Alverson v. Randall*, 13 R. I. 71, is to be taken in its technical sense, unless there is something either in the language of the devise, or the circumstances under which it is intended to take effect, to show that it was used in the sense of "heir apparent," and see *Winter v. Penalt*, 5 B. & C. 864; *Richardson v. Wheatland*, *supra*; *Putnam v. Gleason*, 99 Mass. 454; *Williamson v. Williamson*, 18 B. Mon. 329. In *Alverson v. Randall* the devise was to "W. Alverson . . . and after his decease I give and devise the same to the oldest male heir of my said son W., to him and his heirs forever." The will was made in 1822, at which time W. had a son, who had been born in 1819; the testator died in 1824, W.'s son died in 1836, his father survived him. It was contended that the testator had used the words "oldest male heir" in the sense of oldest male heir apparent, and hence that the remainder was vested in the deceased son of W.; but the Court said: "It seems to us that if the testator had intended to give the remainder to the son of W. Alverson without regard to whether he lived to be the heir of W. Alverson or not, it would have been more natural, as well as more unambiguous, for him to have given it to the son by name, and consequently that his not doing so is evidence that he did not intend the son to take unless he should survive his father, and so become his oldest male heir."

Under the New York Revised Statutes a remainder to heirs is considered as vested and not contingent; see *Moore v. Littell*, 41 N. Y. 66, and cases cited *supra*, on page 295.

Remainder on Death of Particular Tenant without Issue and under Certain Age.

A very common instance of a contingent remainder is found in the case of a devise over on the death of a person holding a precedent estate without

issue, *Way v. Gest*, 14 S. & R. 40; *Stump v. Findlay*, 2 Rawle 168; *Waddell v. Ratteu*, 5 Id. 231; *Garner v. Dowling*, 11 Heisk. 48; *Baldrick v. White*, 2 Bail. 442; *White v. Rowland*, 67 Ga. 546; or in the event of his dying without issue, and under a certain age, *Cheesman v. Wilt*, 1 Yeates 411; and in the case of such a limitation over the remainder will be contingent until the death of the person named as ancestor, even during the time that no children are *in esse*; it will not be held a vested estate liable to divestiture on birth of issue; this is illustrated by *McElwee v. Wheeler*, 10 So. Car. 392, where there was a devise to Agnes, and to any child or children living at her death, "but if she has no children living at the time of her death" then over, it was held that the remainder was contingent even during the time that Agnes had no children, McIVER, J., saying: "Suppose Agnes had died in giving birth to a child who survived her, their [the remaindermen's] right to take would have been not defeated, because that would imply perhaps that the right had once existed, but their chance of having such right, which before vested in contingency would have been entirely lost."

And where such a contingency is expressed in a will in the disjunctive as "die without issue *or* under a certain age," the "*or*" will, if possible, be read "*and*," for the law will not presume that a testator meant to disinherit the issue of the particular tenant on the death of their ancestor before reaching a certain time of life, *Lessee of Hauer v. Scheetz*, 2 Binn. 531; *Welsh v. Elliot*, 13 S. & R. 205; *Belzhoover v. Costen*, 7 Pa. St. 13.

Remainder to One on Arriving at a Given Age.

While a remainder to one on arrival at a certain age, usually that of majority, is generally regarded as a vested remainder, and the effect of the requirement of arrival at the said age is confined generally to postponing the enjoyment of the estate devised or granted, yet a remainder may be so limited as to be contingent on the attainment of a certain age. Thus, in *Megowan v. Way*, 1 Metc. (Ky.) 418, there was a deed to trustees for the benefit, after the death of the grantor who retained a life estate, of P. C. and such other child or children as the grantor might have, to be conveyed to them in equal portions, provided they attained the age of twenty-one years. The remainders were held contingent. And in *Roe, Lessee of Evans v. Davis*, 1 Yeates 332, there was a limitation by will to John Parrock, brother of the testatrix, "during the term of his natural life, and if he leaves lawful issue, then I give my real estate unto such issue; but in case of my said brother departing this life without such issue, or they dying under the age of twenty-one, and without lawful issue, then I give," etc.

MCKEAN, C. J., said: "It appears to me, on full consideration, extremely clear that John Parrock . . . took an estate tail . . . , and that if any of his issue successively had lived to the age of twenty-one years, a contingent fee would have passed to such issue."

Remainder so Limited that Contingency may Enlarge Estate of Particular Tenant.

A remainder may be so limited that its effect will be that on the happening of the contingency the estate of the particular tenant will be enlarged, see *Fearne*, p. 265; thus, in *Hathaway v. Harris*, 84 N. C. 96, there was a devise to H. for life, and if he should die with a lawful child, then to him and his heirs; but if he should die without a lawful child, then to his widow. The devise was held to give H. an estate for life with a contingent remainder in fee.

Limitations in the Alternative.

An estate may be limited over in the alternative, so that upon the happening of a contingency it will pass to one person, and upon its non-happening to another; or there may be two contingencies mentioned, so that upon the happening of one, the estate will follow a certain course, and upon the happening of the other, another course; and such a limitation, we have seen, may be made, though both the estates limited over are in fee, for since only one can by the terms of the limitation take effect in any event, there in such case is no violation of the rule that an estate cannot be limited in remainder after a fee. As said by WILLIAMS, J., in *Buzby's Appeal*, 61 Pa. St. 111: "If the prior fee be contingent, a remainder may be created to vest in the event of the first estate never taking effect, though it would not be good as a remainder if it was to *succeed* instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and in default of such issue, remainder to B., the remainder to B. is good as being collateral to the contingent fee in the issue; it is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or on a double contingency, 4 Kent's Com. 200; *Luddington v. Kime*, 1 Ld. Raym. 203; *Fearne on Rem.* 373. The same doctrine is laid down by this Court in *Dunwoodie v. Reed*, 3 S. & R. 451; *Waddell v. Rattew*, 5 Rawle 231; *Stump v. Findlay*, 2 Id. 168, in reference to similar limitations." See in addition to the authorities cited by the learned Judge, *Way v. Gest*, 14 S. & R. 40; *Stehman v. Stehman*, 1 Watts 466; *Cooper v. Hepburn*, 15 Gratt. 551; *Den ex d. Micheau v.*

Crawford, 3 Hals. 90; *City of Peoria v. Darst*, 101 Ill. 609; *Hennessy v. Patterson*, 85 N. Y. 91.

The validity of an alternative limitation is recognized by statute in California, Civil Code, § 5696, p. 679; New York, Rev. Stat., Pt. 2, Ch. 1, Tit. 2, § 25, p. 2177; Michigan, Howell's Ann'd Stat., § 5541, p. 1443; Minnesota, Gen. St., Ch. XLV., § 25, p. 562; Wisconsin, Rev. St., § 2049, p. 615.

Remainder after Estate Tail.

In Massachusetts, a remainder after an estate tail seems to be regarded as necessarily contingent, *Hall v. Priest*, 6 Gray 18; but this does not seem to be the law generally; see *Roe, Lessee of Evans v. Davis*, 1 Yeates 332; *Luddington v. Kime*, 1 Ld. Ray. 209, S. C. 1 Salk. 224; *Ives v. Legge*, 3 D. & E. 488 (note a); and upon principle there is nothing to prevent a remainder after an estate tail being vested—for an estate is vested if the person to take, were the precedent estate immediately to come to an end, is sufficiently designated; and such a case might well be imagined; if it be said that the great uncertainty that the remainder will ever come into possession, because the estate tail may by possibility endure forever, renders it contingent, it is to be remembered that it is the uncertainty of right only that makes the contingency; and if it be said that all possibility of its ever coming into possession may be destroyed by the act of the tenant in tail himself, it is to be remembered that liability to destruction will not destroy the vested character of a remainder.

Residence of Inheritance before Occurrence of Contingency.

The question has been mooted as to what becomes of the inheritance, where a contingent remainder of inheritance has been limited, during the time which elapses before the occurrence of the contingency. Mr. Fearne, Cont. Rem., p. 351, states the rule to be as follows: "Where a remainder of inheritance is limited in contingency by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor or in the heirs of the testator until the contingency happens to take it out of them." In support of this position, in the course of a most learned review of the authorities, he cites *Sir E. Clere's Case*, 6 Co. 17 b; *Leonard Lovies's Case*, 10 Id. 78, 85 b; *Plunket v. Holmes*, Raym. 28; *Purefoy v. Rogers*, 2 Sanders 380; *Fortescue v. Abbot*, Pollexf. 475; *Wood v. Ingersole*, Cro. Jac. 260; *Barnardiston v. Carter*, 3 Bro. Cas. Parl. 1; and see also *Gest v. Flock*, 1 Green Ch. (N. J.) 108. Mr. Fearne also holds that in the case of a con-

tingent remainder created by a conveyance at common law, the inheritance will continue in the grantor, Fearn, Cont. Rem. 360; and severely criticises the position of those jurists who hold the contrary: "These opinions," he says, "are founded on an assumption that the remainder must pass out of the donor at the time of the livery; and, consequently, that no estate shall remain in him after such livery; and therefore, in the case of a lease to one for life, remainder to the right heirs of J. S., the remainder, they tell us, is in abeyance, or *in nubibus*, or *in gremio legis*: though by way of some sort of compromise between common sense and the supposition of an estate passing out of a man, where there is no person in *rerum natura*, no object besides hard and hardly intelligible words for the reception of it, at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place entitles the grantor or his heirs to enter and reassume the estate. . . . It must be an object of no small curiosity to understand how a remainder can pass from a donor until there exists some donee to receive it of him; if it passes at all, the conclusion seems rather to be, it passes to somebody; and whilst it does not pass to anybody, one might suppose that it does not pass at all. And however profound a solution of this difficulty may be discoverable by adepts in legal lore under the expressions, 'in abeyance,' '*in nubibus*,' or '*in gremio legis*,' I cannot but think it a more arduous undertaking to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles, as well of common law as of common sense, a suspension of the complete or absolute operation of such feoffment or conveyance in regard to the inheritance till the intended channel for the reception of such inheritance comes into existence, in any case at least where a present estate of freehold passes in the meantime as the immediate and initiate subject of the operation of such conveyance. The doctrine of estates to be enlarged upon condition may be referred to for such a principle as no new thing in our law; . . . Gilbert, in the manuscript treatise before referred to, after stating the case of a lease for life, remainder to the right heirs of J. S. then living, and adopting the position of the remainders then being in abeyance, that is, as he says, in no person but *in nubibus*, because the donor has limited it out of him, and all remainders must pass out of him at the time of the limitation, observes, it may be objected that then such remainders ought to escheat to the lord; as well as where his tenant dies without heirs; for they actually passed out of the tenant; and although they could not vest in the persons intended, yet it was not reason-

able they should return to the feoffor against his own grant, and when he had by his own act parted with and given them away; but the lord ought rather to have them by escheat. In answer to which objection he says, it is to be observed that the reason of the escheat is the death of the tenant without heirs, and that so are the words of the præcipe; but nothing vested in J. S. or his heirs, and therefore the lord could have no escheat as from them. And as to the feoffor, he or his heirs were still *in esse*; and since the grantee could not take the remainder, and no other person had a right to claim it, it must return back again and settle in the feoffor as if no such disposition had been made.

“Now what does such answer to the objection plainly amount to, more or less, than that the feoffor and his heirs still continued tenants to the lord; because neither the grantee nor any other person in the world having acquired a right under the limitation of the remainder, it was as much out of the case of the feoffor and his heirs, as fully entitled, as if it had never been made? To whom, then, could it have passed out of the grantor? And from whom could it ever return to him? Where is the sense in saying, a remainder must pass out of the grantor in a case where you deny it ever passed at all to the grantee or anybody else? Or that livery must have its immediate operation in a case where it is admitted to have left the estate in the same plight exactly as if it had never been made at all? Would there not be better sense in considering the disposition itself in all these cases, as put in suspense, till the event or contingency referred to decides its effect? What is there to move the subsisting estate in the land from the grantor before the alienation of it takes effect? That alienation may indeed rest in abeyance or expectation till the contingency or future event gives it operation. And it is that rather than the resuspended inheritance to which, during its mere potential undecided operation, the allusion of *caput inter nubila condit* seems most applicable.” Fearné Cont. Rem. 360-363.

The reasoning of Mr. Fearné seems unanswerable, and may be said to have met with general acquiescence; but there are authorities which hold to the possibility of the fee being in abeyance. See *Bohon v. Bohon*, 78 Ky. 408.

Vesting of a Contingent Remainder.

The first rule to be borne in mind in determining when a contingent remainder vests is that it must be held to vest at the earliest time consistent with the terms of its limitation, *Doe ex d. Poor v. Considine*, 6 Wall. 458; *Braden v. Cannon*, 1 Grant 60; *Johnson v. Valentine*, 4 Sand. Sup. Ct. 36; *Lantz v. Trusler*, 37 Pa. St. 482; *Pierce's Appeal*, 4 W. N. C. 439; as said

by STONE, J., in *Crisp's Trustees v. Crisp*, 61 Md. 149: "If the law favors the vesting of property, it necessarily favors its vesting at the earliest period. Every postponement of vesting renders it contingent and uncertain, at least as to the person who is to take. No reason can be assigned as to the vesting itself that will not apply to the *earliest* practicable vesting. In the absence of plain expressions, or an intent plainly inferrible from the terms of the will, the earliest time for the vesting will be adopted where there is more than one period mentioned in the will." Thus in *Williamson v. Field*, 2 Sand. Ch. 533, there was a devise to trustees in trust "for T. B. Clarke for life, and on his death to convey to his lawful issue living at his death, and if no such issue to C. C. Moore." The remainder was held to vest on the birth of a child, and not to have to wait to vest until the death of Clarke, notwithstanding that the share of the child in whom the vesting first took place might be subsequently divested either *pro tanto* or *in toto*. SANDFORD, A. V. Ch., said: "The interest was doubtless contingent as to the children before it was known that Clarke would have issue. . . . But whenever a child is born to whom a remainder has been previously limited such remainder then vests in the child, if he be certain to take it by the terms of the gift. Each child of Clarke was certain to take, unless his estate should be divested by his death in Clarke's lifetime. In respect of that liability to have the estate defeated, this remainder after the birth of a child in no respect differs from the instances so common with English conveyances and devises of an estate given to A. for life, remainder to B. for life, remainder to C. for life, and then to D. in fee. It has never been doubted but that such remainders to B. and C. are vested. Yet it is obvious that the death of either B. or C. in the lifetime of A. will prevent the limitations in his favor from ever taking place." In *Cooper v. Hepburn*, 15 Gratt. 551, there was devise to M. for life and to his children, if he should have lawful issue; if not . . . "to my grandchildren." At the date of the will M. had no children; the Court held that the remainder was contingent until the birth of the first child of M., when it became vested, and the alternative remainder to the grandchildren was defeated. In *Wendell v. Crandall*, 2 Denio 9, S. C. 1 Comst. 491, a remainder to the eldest son of the first taker was held to vest on the birth of a son.

In *Drew's Adm'r v. Drew*, 66 Ala. 455, there was a devise for life to the sister of the testator, followed by this devise over, "at the death of my sister, her children, or those of them who are living at the time of her death, are to have the property herein devised and bequeathed; but if any one should die before receiving the share allotted under the will and leave children, such child or children to receive the portion which would have

gone to the decedent." The life tenant had a son, Thomas, who survived his mother, but died without issue before partition of the estate. The Court held that the contingency was satisfied by the survival by Thomas of his mother, and that the estate then vested irrevocably in him. And see *Stonebraker v. Zollickoffer*, 52 Md. 154; *Hubbard v. Selser*, 44 Miss. 705.

In *Duncan v. Prentice*, 4 Metc. (Ky.) 216, a remainder was devised after a life estate on condition that the remainderman should pay a certain sum of money. During the existence of the life estate the remainderman paid a part of the said sum and took a receipt on account; this was held such an acceptance on his part as vested the remainder in him and made him liable for the rest of the sum named in the will.

In *Inches v. Hill*, 106 Mass. 575, there was a devise to C. for life, with power of appointment, and after her death and in default of appointment amongst her children, to the use of all and every the child and children of said C. in fee; "but if said issue shall die before attaining majority or day of marriage" over. The Court held that the remainder vested on the death of the mother without having made an appointment, and did not wait until the day of marriage or majority, and so far followed the rule of vesting at the earliest possible time, but the case seems open to criticism; for the power of appointment not being general, but limited to a class, the better opinion would seem to be that the remainder was vested in the children, if living at the time the particular estate took effect, subject to be divested, by the exercise of the power, as to those in whose favor no appointment should be made; see p. 284 *et seq.*, and if the children were not living at the time the particular estate took effect the rule of earliest vesting would seem to require that the remainder should vest in each child as it came into being.

Contingency not Destroyed by its Improbability.

But while the law favors vesting at the earliest possible moment, yet it will not brush aside a contingency whose occurrence may prevent the remainder from ever vesting, on account of the improbability of that contingency ever happening, for the rule is that the improbability of a contingency does not destroy it. Thus where the remainder depends upon the death of a certain person without issue, the remainder cannot vest until the death of the said person, for, as Lord COKE says, "the law seeth no impossibility of having children," Co. Litt. 28; and to the same effect, Blackst. Com., Lib. 2, p. 125. It is true that in *Macomb v. Miller*, 9 Paige 265, S. C. 26 Wend. 229, it was held that where issue had become impossible, a contingent fee might become vested; but on examination of the case it appears from the opinion

of the Chancellor, that it was "agreed and admitted by the parties that the birth of any other children had become physically impossible," and he therefore held that the daughter of the complainant in the bill was, at the time of her death, the absolute owner of the premises in question, subject only to her mother's life estate, the devise being to the mother, and after her death to her children, "if she have any;" and that, therefore, on the child's death, further issue having become impossible and the father of the child being dead, the mother took a vested remainder by inheritance from her daughter, which merged with the life estate. On error, COWEN, J., remarked that the Chancellor had found that issue was impossible; but WALWORTH, Ch., at once denied the assertion, saying he could not have been guilty of such an absurdity, and called attention to the agreement of the parties to the case. This case then is not in conflict with the rule, or at least is not an authority against it; for the agreement, although it may have been of something which the law knows not, yet presented impossibility as a peculiar and admitted fact, the legal effect of which was to be passed upon by the Court; and see *In the Matter of Ryder*, 11 Paige 185, where the same Chancellor says, "the extent even of the contingency cannot be ascertained while the mother is alive and is capable of bearing children." The latter part of the sentence may seem to imply that the law will look into the possibility of child-bearing; but if taken in connection with the statement of Coke, with whom we may presume the learned Chancellor was in accord, it would be a mere superfluous addition to the correct statement of the law. But the rule is upheld in modern cases, which speak without any hesitancy; see *Garner v. Dowling*, 11 Heisk. 48; *Wells v. Ritter*, 3 Whar. 208. In *List v. Rodney*, 83 Pa. St. 483, the age of the ancestor named was seventy-five, and it was argued that as the citations from Blackstone and Coke occurred in passages referring to estates tail after possibility of issue extinct, that the doctrine that the law "seeth no impossibility" should be confined to estates tail, and meant merely that the law would not, for the purpose of altering the character of the estate tail, assume any time at which the possibility of the man and woman named as the stock should be held incapable of having issue, and that the doctrine should be treated as establishing a rebuttable presumption, as in case of the presumption of legitimacy; but the Court held that the rule was of force, and of wider application than, in the estimation of the counsel for the appellees, it was. MERCUR, J., said: "The rule has stood the test of time and received the sanction of ages. No case has been cited showing that it has ever before been questioned in Pennsylvania. Nature has fixed no certain age, by years, at which a child-bearing capacity shall begin or end. Any conjecture based on age is too doubtful and uncertain to result in any reliable

conclusion. It was well said in *Jee v. Audley*, 1 Cox 324, 'if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest sort of the greatest inconvenience to give a latitude to such sort of conjecture.' It is contended that this doctrine of possibility of issue is only applicable to cases of estate tail after possibility of issue extinct; that it is simply a presumption governing the devolution and quality of estates, and that it should not be presumed when the facts show it to be impossible. The argument is fallacious. The very question before us is whether the possibility of issue is extinct. It affects the transmission of the estate. It diminishes the interests which the children now living may take. The presumption of law is in favor of issue, notwithstanding advanced age. It is a presumption of law on the very fact which we are requested to say destroys the presumption. The argument makes a conjectural conclusion rest on a fact where the law declares no such conclusion shall be deduced from the fact."

In accordance with the position that the law will not permit the rule which favors the vesting of a remainder at the earliest possible moment to be distorted into a means of striking down a contingency is the interpretation given in New York to the provisions of the Revised Statutes, that where a remainder is limited on more than two successive life estates, all life estates subsequent to those of the first entitled life tenants shall be void, and the remainder shall take effect in the same manner as if no other life estates had been created, 1 Rev. St. 703, § 17; Rev. Stat. (Throop, 1882), Pt. 2, Ch. 1, Tit. 2, § 17.

In *Purdy v. Hayt et al.*, 92 N. Y. 446, there was a devise to Jane and Catharine during their respective lives, as tenants in common, with cross remainders, and after their death, the subject of the devise to be sold and the proceeds invested, the income to be paid to Elizabeth Brinckerhoff for life, and on her death the principal to be divided among her children, and if she should die without issue, then over. It was contended, that the life estate to Elizabeth Brinckerhoff being void, under the above cited statute, the contingent remainder vested in possession on the death of Jane and Catharine, but the Court of Appeal, speaking by ANDREWS, J., said: "The seventeenth section preserves a remainder limited on more than two successive estates for life. But we apprehend that the section must be construed as referring to vested and not to contingent remainders. It cannot in reason, or by its true construction, be held to apply to the latter. When the right of the remainderman is vested, and the right of possession only is postponed, the statute, in case of three or more precedent estates for life, accelerates the period fixed by the will or deed for the vesting of the remainder in possession, and vests it immediately upon the termination

of the two estates for life first created. The statute so far overrides the precise intention of the grantor or testator as expressed in the will or deed, but as the possession of the remainderman was postponed presumably for the purpose of allowing an intermediate life estate to run, and that purpose being defeated by section seventeen, the statute, by accelerating the remainder, gives effect as near as may be to the intention of the creator of the estate. But where the gift in remainder is upon a contingency which has not happened at the time of the death of the second life tenant, so that it cannot then be known who will be entitled according to the terms of the instrument creating the estate, the statute, we conceive, can have no application.

"The construction that section seventeen applies only to vested remainders is, moreover, sufficiently plain upon its language. The remainder, the section says, is to take effect in the same manner as if no other life estate had been created. Where the remainder was contingent when the life estate commenced, and remains so at the death of the tenant of the second life estate, it would not vest although no other life estate had been created, and the statute gives effect to remainders only in the same manner as if limited upon two life estates instead of three. It is plain, we think, that the statute only executes the remainder in possession in favor of such ascertained persons as, except for the void life estate, would under the terms of the will or deed be entitled to the immediate possession." The Court held that the life estate of Elizabeth was void as to the share of the land devised which belonged to Jane, who preceded Catharine, and that the contingent remainder limited on Elizabeth's death could not vest in possession in Elizabeth's children, Elizabeth being alive at the death of Catharine.

Statutes identical with the one considered above exist in Michigan, How. Ann'd Stat., § 5533, p. 1441; Minnesota, Gen. Stat. (1878), Ch. XLV., § 17, p. 562; Wisconsin, Rev. St., § 204, p. 815.

Contingent Remainder must Vest during Continuance of Particular Estate or *eo instanti* that it Determines.

The next rule to be borne in mind is that a contingent remainder must vest during the continuance of the particular estate, or upon the instant it determines, or not at all, *Chudleigh's Case*, 1 Co. 283; *Archer's Case*, Id. 63; *Colthirst v. Bejushin*, Plow. 21; *Barclay v. Lewis*, 67 Pa. St. 316; *Doe ex d. Poor v. Considine*, 6 Wall. 458; *Fearne Cont. Rem.* 308, 310; 4 Kent's Com. 249. If it do not then vest it is gone forever.

Therefore, as in the example given by *Fearne*, if there be a lease for life to the right heirs of J. S., and the tenant for life predecease J. S.; or if there

be a lease for years to B., with remainder in tail to C., remainder to the heirs of B., and C. die without issue before B.; in neither of these cases can the contingent remainder ever take effect; for in the first case there is no one answering the description of the "heirs of J. S." at the time the particular estate determines; and in the second, the expiration of the estate tail leaves the contingent remainder without any preceding estate of freehold to support it.

This rule, it may be here noted, has been practically and in some cases expressly abrogated in the States of New York, Michigan, Minnesota, Wisconsin, Texas, Virginia, West Virginia, Kentucky, Georgia, by the operation of the statutes cited *supra*, p. 277.

Contingent Remainder Limited to Several need not Vest in All at the Same Time.

It is to be remembered, however, that a contingent remainder, which is limited to more than one person, need not take effect in all at the same time. It may vest in some at one time and in others not until a later period, *Wager v. Wager*, 1 S. & R. 373; and where there is a contingent remainder to several in common, it is sufficient if any one of the remaindermen is capable of taking at the expiration of the particular estate. In that case he will take the estate, and those becoming capable afterwards will so far have the benefit of his seizin that his estate will be divested so as to allow them their share; thus, in *Wager v. Wager*, *supra*, there was a grant to a husband and wife for their use for their lives and the life of the survivor, and from and immediately after the death of the survivor to the children, heirs of the body of the wife; at the date of the deed some children were living; the Court held the remainder was vested in the children then living, and that the vesting would preserve the estate for the benefit of the children afterwards to be born, and as to whom the remainder was contingent. TILGHMAN, C. J., said: "The remainder was in some measure contingent, because it was uncertain whether any or how many children would be born afterwards. But there is no necessity for the remainders remaining contingent until the death of the survivor of *Wager* and wife, and then vesting at the same moment in all the children then living. . . . The whole remainder might vest immediately in those children who were living at the date of the deed, subject not to an absolute divestment, but to an alteration or lessening by the birth of other children. At each subsequent birth the remainders would open to let the child in, and so *toties quoties*." YEATES, J., said: "A contingent remainder may take effect in some and not in all the persons to whom it was

limited, according as the same may come *in esse* before the determination of the preceding estate, and others not. They may take jointly notwithstanding the different times of vesting." Examples of the application of this doctrine are found in cases cited *ante*, p. 286; and in *Hubbard v. Selser*, 44 Miss. 705; *Stonebraker v. Zollickoffer*, 52 Md. 154; *Williamson v. Berry*, 8 How. 495. The most common example is where there is a contingent remainder to children born and to be born, and the only contingency is birth, in such case the remainder will vest in each child upon his birth, *Macomb v. Miller*, 9 Paige 265, S. C. 26 Wend. 229. Other examples may, however, be given, as where there is a remainder in common contingent upon the remaindermen reaching each the age of twenty-one years. Here, as each attains twenty-one, the estate would vest in him, subject to be divested *pro tanto* to let in each other remainderman attaining the prescribed age.

Remainder can become Vested in an Infant *en ventre sa mere*.

The rule of instantaneous vesting was at the common law pressed with great strictness, so that if the remainderman were *en ventre sa mere* at the determination of the particular estate, it was held that notwithstanding his subsequent birth, the remainder had failed; but this was changed in England by a combination of legislative and judicial authority. In *Reeve v. Long*, 1 Salk. 227, an estate was limited to A. for life, remainder to his eldest son in tail. A. died, leaving his wife *enceinte* of a son who was afterwards born. The Common Pleas held that the son could not take the remainder because he was not *in esse* at the time the particular estate determined. On error, the King's Bench affirmed this judgment, which was, however, reversed by the House of Lords against the opinion of all the Judges, who, according to Fearn, were much dissatisfied with the reversal. Fearn adds that an Act of Parliament was thought necessary to take case out of the old law. But Chancellor Kent seems to have regarded *Reeve v. Long* as settling the law, see 4 Kent's Com. 269, and it is noteworthy that the act to which Fearn refers, 10 & 11 Wm. 3, Ch. 16, makes no express mention of devises or limitation by will, but merely enacts that where any estate is by marriage or any other settlement settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's lifetime. To account for this, Butler (note 259, Co. Litt.) says "that there is a tradition that as the case of *Reeve v. Long* arose upon a will, the lords considered the law settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear

to call in question the authority or propriety of their determination." This tradition Butler evidently derived from Cruise, see 2 Cruise Dig. 330. Whatever the opinion of the Judges of the time of William III. may have been, it is thought that the determination of the House of Lords was in accordance with natural justice and good sense, and has prevented the defeat on many occasions of the intent of a testator or of parties to a settlement or deed. It is now well established in this country that a child *en ventre sa mere* is considered for all purposes for his own benefit as actually born, *Stedfast v. Nicoll*, 3 Johns. Cas. 18; *Swift v. Duffield*, 5 S. & R. 38; *Marsellis v. Thalhimer*, 2 Paige 35; *Jenkins v. Freyer*, 4 Id. 47; *Wells v. Ritter*, 3 Whart. 208.*

In *Barker v. Pearce*, 30 Pa. St. 173, a remainder to "such child or children born in lawful wedlock" as the life tenant "should leave at the time of his death," was held to be vested in a child *en ventre sa mere* at the death of the life tenant, although the life tenant left a child born. It was argued that the remainder vested exclusively in the child who was born, and that the prior decisions in Pennsylvania had rested on the peculiar form of the will in each case, in the one, *Swift v. Duffield*, there being a general devise to children, in the other, *Wells v. Ritter*, the devise over being to issue by the testator *begotten*, and that the expression "born in lawful wedlock" should have a more restricted effect than that given to the other devises, and must necessarily imply and require actual birth; but the Court, after reciting the terms of the remainder, in a short *per curiam* opinion, decided that the posthumous child took an undivided half of the estate.

In *Crisfield v. Storr*, 36 Md. 129, T. W. conveyed one-half of a farm to M. W. in fee, leaving Sally Bradshaw, wife of J. Bradshaw, his sole heir, to whom the other half of the farm descended. M. W. devised her half to Sally Bradshaw for life, and provided that "if said Sally Bradshaw should have a child to cry, then to said child, if not then" over. On May 24, 1842, Mr. and Mrs. Bradshaw conveyed the farm to one H. P., under whom Storr claimed. On September 25, 1842, W. E. L. Bradshaw was born of Mrs. Bradshaw. In 1867 he claimed the land. It was argued that the remainder was contingent, and had been barred by the conveyance of Mrs. Bradshaw, in whom the life estate and the fee had merged; but the Court held, notwithstanding the expression "should have a child to cry," that the remainderman being *en ventre* at the time the conveyance

* It may also be noted here that in *Wells v. Ritter*, KENNEDY, J., points out that for certain purposes not for the infant's benefit, he may while *in ventre* be regarded as *in esse*; thus he may be vouched in a recovery, Co. Litt. 390 a; *Thellusson v. Woodford*, 4 Ves. 322.

was made, the remainder had become vested in him, and hence was not barred by the conveyance.

With regard to the rights of others, it has been held that where a child is born dead within such an early stage of pregnancy as to have been incapable of living, it will not be deemed to have been *in esse*, and if born within six months after conception, the presumption is against its capacity of living, *Harper v. Archer*, 4 Sm. & Mar. 99; *Marsellis v. Thalhimer*, 2 Paige 35; 4 Kent's Com., p. 249, note *b* (12th ed.).

The right of the posthumous child to take under a future limitation to heirs, issue or children, is established by statute in Alabama, Code (1876), Art. V., § 2182, p. 572; California, Civil Code, § 5698, p. 679; Michigan, Howell's Ann'd Stat., § 5546, p. 1443; New York, Rev. Stat., Pt. 2, Ch. 1, Tit. 2, § 30, p. 2178; Minnesota, Gen. Stat., Ch. XLV., § 30, p. 563; Mississippi, Rev. Code (1880), § 1202, p. 347; Missouri, Rev. St. (1879), § 3945, p. 676; Wisconsin, Rev. St., § 2054, p. 616; North Carolina, Bat. Rev., Ch. 42, § 4, p. 384.

In Illinois, it is provided by statute that an estate limited in remainder to the child or children of any person to be begotten, such child if posthumous shall take, although no estate shall have been conveyed to support the contingent remainder after the parents' death, Rev. St., 1883, Ch. 30, § 14, p. 281. The law is the same in Kentucky, Gen. Stat. (Bull. & Fel. 1881), Ch. 63, Art. 1, § 15, p. 586; and Colorado, Gen. Stat. (1883), § 205, p. 172.

In California, in addition to the statute noted above, it is enacted that a child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, shall take if it answers the description of the class, Civil Code, § 6339, p. 727.

Destruction of Contingent Remainder.

A contingent remainder may be destroyed by any occurrence which brings to an end the particular estate before the happening of the contingency on which the remainder is to vest, *Doe ex d. Poor v. Considine*, 6 Wall. 458; but the alteration of the particular estate as to quality only will not bar the contingent remainder, thus where there are two joint tenants for life, with remainder over, and the jointure is severed, the contingent remainder will not be affected, 4 Kent's Com. 253.

Feoffment by Particular Tenant.

A feoffment by the particular tenant will destroy a contingent remainder depending upon his estate, *Archer's Case*, 1 Co. 66; *Doe ex d. Pope v. Pickett*, 65 Ala. 487; *Faber v. Police*, 10 So. Car. 376; *M'Elwee v. Wheeler*, Id. 392; *Redfern v. Middleton*, Rice 459, in which last case HARPER, Ch., in the course of his opinion, went into an examination of the law, and declared that the rule that a contingent remainder could be barred by a feoffment by the particular tenant was not obsolete in South Carolina, and further held that as the destruction of the remainder rested on the forfeiture of the particular estate, brought about by the tortious act of feoffment of the particular tenant, the infancy of the contingent remainderman would not save his remainder. At the same time the Court held that equity would not force a vendee to accept a title by feoffment from the particular tenant, citing *Dehon v. Redfern*, Id. 459.

Conveyance under Statute of Uses. Execution.

A contingent remainder will not be barred where the particular tenant conveys in fee by deed of a bargain and sale or by any other conveyance which takes effect through the statute of uses, *Hall v. Want*, Phillips Law 502; *Grier v. McAfee*, 82 N. C. 187; *Dennett v. Dennett*, 40 N. H. 498; *Doe ex d. Pope v. Pickett*, *supra*; and a sale of the particular estate on an execution against the particular tenant will not affect the contingent remainder, although the remainderman be not *in esse*, for a judicial sale, like a deed of bargain and sale, passes only the right title and interest of the debtor, and hence no forfeiture can be worked. See *Phillips v. Johnson*, 14 B. Mon. 172; in that case there was a life estate in a woman with remainder to her unborn children; before the birth of children an execution was issued against the woman and the property sold thereunder; the remainder was held not to be affected by the sale. Under the Illinois conveyance act it is held that a conveyance by the particular tenant will not affect a remainderman although not *in esse*, *Frazer v. Supervisors of Peoria Co.*, 74 Ill. 289.

Fine.

The effect of a fine is the same as that of a feoffment, *Fearne Cont. Rem.* 317; 4 Kent Com. 253; Co. Litt. 252 a; *Bouknight v. Brown*, 16 So. Car. 155.

Common Recovery.

If the particular tenant suffer a common recovery, the effect will be to bar the contingent remainder, Co. Litt. 262 a ; *Bouknight v. Brown, supra*. There appears to have been no dispute in this country as to this position where the particular tenant had an estate tail, *Dunwoodie v. Reed*, 3 S. & R. 435 ; *Nightingale v. Burrell*, 15 Pick. 104 ; but it was at one time doubted by very good authority whether, when the particular estate was for life only, such a result would follow upon a common recovery suffered by the life tenant. In 1817, in the case of *Dunwoodie v. Reed*, 3 S. & R. 435, it was argued before the Supreme Court of Pennsylvania that, under the policy of this country, a common recovery suffered by a tenant for life would not, in Pennsylvania, have the effect of barring a contingent remainder ; and the question was considered at considerable length and learnedly by the judges. TILGHMAN, C. J., said : " The law of forfeiture was founded on good principle. It was a punishment of the tenant for life for an unjust attempt to injure the remainderman by passing away the fee-simple of the estate. When the remainder was vested, all was right. The remainderman entered and took advantage of the forfeiture. But where the remainder was in contingency, a hardship arose by the destruction of it. This was unavoidable. It fell for want of support by a preceding estate ; but still the wrongdoer was punished by the entry of the heir. But, to be sure, there seems to be an impropriety where the wrongdoer happens to be the heir, for then there is no one to take advantage of the forfeiture, and the wrongdoer gains the fee-simple by his own wrong. This is an accidental case, but it certainly is an imperfection in the system. We are not at liberty, however, to alter it, but must take the whole as we find it. After all, it is no harder on the remainderman to be bound than it is for the issue in tail to be bound by a common recovery suffered by his ancestor. Yet, from motives of policy, this is permitted. Our ancestors brought with them to Pennsylvania all those parts of the common law which were suited to their situation. In order to prove, then, that a common recovery does not produce a forfeiture here, it must be shown either that it has been so ordered by Act of Assembly, or that the principle of forfeiture was improper in the situation of the province at its first settlement. The Acts of Assembly will speak for themselves ; but as to the convenience or inconvenience of forfeiture, the most powerful evidence will be the practice and the opinions generally entertained by men of the profession of the law." His Honor then considered the argument that the Act of 1749 limited the effect of common recoveries to the single object of barring estates tail ; this Act he considered as affirmative throughout and as limited in view to barring estates

tail and in that respect merely declaratory of the common law, so that, in his Honor's view, no argument against a forfeiture by a common recovery and the consequent destruction thereby of a contingent remainder could be drawn from the silence of the Act with reference thereto. His Honor also considered the Act of 1715 "to provide for the recording of deeds," and held that that Act had no application. With regard to practice and authority, he cited the extra-judicial opinion of Chief-Justice CHEW, the fact that common recoveries had been resorted to, under advice of counsel, to bar the contingent remainders in the great Hamilton estate, and an unreported decision of BIRD WILSON, P. J., in the case of *Rattew v. Cornish* in the Common Pleas; and concluded his opinion as follows: "The objection that the law of forfeiture is founded on feudal principles is of no weight; those principles are so interwoven with every part of our system of jurisprudence, that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain may easily be removed by Acts of the Legislature. In that way the future may be provided for without injuring the past. But should this Court undertake to shake a principle which has become a rule of property, the mischief would be incalculable. The Court cannot say that what *has been done* shall stand, and *in future* the law shall be altered; their decision must be retrospective as well as prospective. Moreover, I doubt very much whether it be not the policy of this country to facilitate the destruction of contingent remainders as well as of estates tail. They tend to prevent the free enjoyment and alienation of land, whereas the spirit of our constitution and laws has a direct contrary tendency. They tend to throw large estates into *one hand*; but the object of our laws is to divide them among *many*. In short, we shall probably find upon reflection that our ancestors, who suffered contingent remainders to be barred in this way, were not so unwise as at first thought we might suppose them. The subject is of great importance, and, upon full consideration, I am of opinion that it is safest to adhere to a principle adopted in the earliest times by the people from whom we derive our laws, persevered in to the present moment, and never contradicted by the decision of any Court or the Act of any Legislature in this country."

GIBSON, J., differed from the Chief Justice, admitting the rule in England to be that the contingent remainder would be barred by the common recovery suffered by the particular tenant; he denounced the application of doctrines which allowed the tenant of the particular estate to, by his own act, defeat the intention of the grantor as "monstrous;" he admitted that for a short time prior to January 27, 1750, common recoveries were

partially in force, but claimed that the act of that date limited the operation of common recoveries to estates tail by its phraseology, declaring their operation "to be of like force and effect to all intents, constructions, and purposes, *for barring estates entailed* as fines and common recoveries by the laws of England" were declared to be; this, he argued, followed not only from the above phraseology, but from the preamble of the Act, which recited that evil consequences would result from entailing estates without any provision for barring them, and declared "that for the preventing whereof for the *future*" fines and recoveries then suffered, or to be suffered thereafter, should be valid. Said the learned Judge: "Is not this a declaration that fines and recoveries were considered invalid theretofore, and that this part of the common law was not then introduced, else why legislate at all on the subject? Because, say the counsel, it was necessary to declare what the common law was. No such matter; there never was a doubt since *Taltarum's Case* but that, by the principles of the English common law, an entail might be barred by a common recovery. It was not even to remove a doubt whether this part of the common law had been adopted (there was more than a doubt that it had not), but, as the Legislature declares, to prevent for *future* the pernicious consequences of *perpetuities*. To limit the operation of recoveries, undoubtedly, was not the sole object of the Act, but also to introduce them as a mode of conveyance; and being thus introduced, it is evident they were expressly restrained to the barring of entails. But I readily admit that necessity, unaided by any Act of Assembly, would, long before the present period, have compelled the courts to sustain fines and recoveries, and that thus introduced they would have been accompanied with all their common law incidents; but the question is, how did the matter stand at the passing of the Act? It is evident the Legislature never supposed contingent remainders could be barred by *any* mode, nor did they *intend* that they should; for when the Act of 1799 introduced a more simple and less expensive mode than the common recovery, acknowledged by a deed in Court, it was exclusively adapted to the *barring of entails*. Yet the intention was to provide a substitute for the old mode, coëxtensive with its whole operation, and one that, in practice, would supersede it altogether. If, then, an idea of barring contingent remainders by recoveries had been entertained, it might naturally be expected that the Act of 1799 would have provided for them as well as entails. I think I have thus shown that recoveries have no force but what they derive from the Act of 1750. In the absence of judicial decision, the uniform opinion of the Legislature and the profession on the subject, as far as it can now be ascertained, ought to be satisfactory. My ground, then, is that as common recoveries never had any force here as a part of the

common law, and as they were introduced by statute for a definite, limited, and special purpose, and to have an operation in a particular case only, they are for all other purposes and in all other cases without effect and void. But even were it otherwise I would prefer giving some effect and meaning to the Act of 1750 (rather than render it nugatory), by supposing the Legislature intended to restrain their operation if they did not intend to introduce them; but that they were introduced by statute and not by the common law, the circumstance of the Legislature having acted on the subject at all, the reason expressed in the preamble of the Act for having so acted, and the declaration of Chief-Justice SHIPPEN,* all conspire to prove." With reference to the question whether the doctrine of forfeiture were in force in Pennsylvania, Judge GIBSON continued: "There has been neither decision nor usage till within a very late period, when there was, I am told, a single decision of a judge of a County Court (who is, I own, a very respectable lawyer), and also a recovery or two suffered, with the express view of defeating a contingent remainder. In Pennsylvania, therefore, the idea is quite modern, and confined to the immediate neighborhood of Philadelphia, where it seems to have been entertained by the bar; but in the State at large it has never, as far as I can learn, been countenanced by the profession. The case of the Hamilton estate is rather an instance of experiment than evidence of settled usage. I have not the slightest fear that the doctrine I contend for would have the effect of disturbing titles; for whatever may have been the abstract opinion of some members of the Philadelphia Bar (and I confess they were highly distinguished in their profession), I believe there are at most but two cases in which it was put in practice and a recovery suffered with the express view of defeating a remainder. If, then, this doctrine of forfeiture, which is one of the oppressive incidents of feudal tenures, has not been already engrafted on our system, why should we, who profess not to have adopted the whole common law, lean towards its introduction now? I would be the last to pull down any part of the Gothic edifice of our land title, but I would also be the last to reunite to it a part which the wisdom of experience had retrenched. It cannot be denied that the defeating of the remainder would in this instance operate most unjustly against the plaintiff. It is true, where an entail is docked, the same hardship is felt by the issue, and the intention of the donor equally frustrated; that, however, is tolerated from motives of policy only. Perpetuities are prejudicial to the general weal; and when a person is prevented from claiming under a limitation prohibited by the interest and policy of society, he has no right to complain. But as to policy, entailments and contingent

* See *Lessee of Morris v. Smith*, 1 Yeates 244.

remainders stand on different ground. Indefinite restriction or alienation is contrary to the genius of our laws, but restriction to a reasonable extent is tolerated. Land ought not to be transmissible like chattels, and we have witnessed the deplorable consequences of its having become an article of commerce. Convenience and the state of society in this country begin to require a more complex settlement and disposition of real property than has hitherto prevailed. This, it is said, may be effected and the contingent interests secured by interposing trustees to support remainders. That would have great force if every disposition of property were the deliberate act of a man in perfect health, both of body and mind; but we know that the final disposition is the last act of almost every man's life. What scrivener usually employed on these occasions knows anything about the necessity of trustees to support remainders? Policy and a regard for the intention of men destitute of counsel and endeavoring to provide for the exigencies arising from the peculiar situation of their families require that their arrangements should not be cut up by a *technical consequence* unfounded in justice or reason. By preserving these contingent estates without the intervention of trustees, we but vary the form of effecting the same object, the estate being tied up no longer than if trustees had been actually interposed; that is, a life or lives in being and twenty-one years, with the usual period of gestation, afterwards; for where the particular estate is a fee-tail, undoubtedly a recovery will bar the remainder."

These two great Judges differing in opinion, and DUNCAN, J., who had been of counsel in the cause, giving no opinion, while judgment was entered in accordance with the view of the Chief Justice, affirming the decision of the Common Pleas, the question of law was left unsettled. A few years later, 1823, the same question came before the Court in a case involving the common recovery suffered in the Hamilton estate, *Lyle v. Richards*, 9 S. & R. 322. The composition of the bench was the same as in 1817. In the language of DUNCAN, J., the case presented to the view of the Court one single abstract proposition, and that was, did a common recovery, suffered after the passage of the Act of 1749-50 by tenant for life with contingent remainders in tail, destroy those remainders? The case was argued elaborately by counsel of the highest order—Joseph R. Ingersoll, Horace Binney, and John Sergeant. TILGHMAN, C. J., and GIBSON, J., adhered to their former opinions, and supported them at length; and DUNCAN, J., who was now at liberty to speak his mind, and who felt most sensibly the duty he had imposed upon him in settling, as sole arbiter between the Chief Justice and his brother GIBSON, a general principle as to the nature of tenures, agreed with TILGHMAN, C. J., and delivered a careful and learned opinion. This case settled the law to be in Pennsylvania that suffering a common recovery by a par-

ticular tenant whether in tail or for life, caused a forfeiture and the consequent destruction of contingent remainders depending upon the life estate; see *Abbott v. Jenkins*, 10 S. & R. 296; and so firmly established was this doctrine of forfeiture, that in *Stump v. Findlay*, 2 Rawle 168, decided in 1827, the Court, which—TILGHMAN, C. J., having retired—was composed of GIBSON, C. J., and DUNCAN and TOD, JJ., held that where a void attempt to suffer a common recovery had been made by the life tenant, yet, as at common law the attempt *per se* worked a forfeiture, the contingent remainders limited on the life estate were destroyed. This case is the more noteworthy from the fact that it was practically a decision of the Chief Justice alone, since neither of the *puisne* justices took any part in the decision. And see also *Waddell v. Rattew*, 5 Rawle 231.

In Massachusetts, it is expressly enacted that expectant estates shall not be defeated by the destruction of the precedent estate through a forfeiture, disseizin, surrender, or merger, Pub. Stat. (1882), Ch. 126, §§ 7, 8, pp. 744-45; but it is provided that these sections shall not prohibit the barring of estates tail by means provided in Ch. 120, which chapter also provides that a conveyance by a tenant in tail actually seized shall also bar remainders thereon, Ch. 120, § 15, p. 733; and the act applies also to equitable estates, § 17, p. 733.

Where an Estate Tail is Barred, Remainders Dependent on it Fail.

Where an estate tail is barred by a common recovery, all the contingent remainders depending upon it fail. In Massachusetts, a conveyance by the tenant in tail which has the effect of barring the entail will likewise bar the remainders dependent thereon, *Nightingale v. Burrell*, 15 Pick. 104; *Holland v. Cruft*, 3 Gray 162; *Holl v. Thayer*, 5 Id. 523; *Whitaker v. Whitaker*, 99 Mass. 364; *Allen v. The Trustees of Ashley's School*, 102 Id. 262; *Wheelwright v. Wheelwright*, 2 Id. 447; *Soule v. Soule*, 5 Id. 61; *Lithgow v. Kavenagh*, 9 Id. 161.

And this would seem to follow in all States which have statutes providing for the barring of estates tail, for the bar should certainly carry with it all the effect thereof. In Pennsylvania it has been held that where a person imagining herself seized of an estate tail, by operation of the rule in Shelley's case, when in reality she was only seized of estate for life with a contingent remainder dependent thereon, executed a statutory deed to bar the entail, the deed was of no effect as to the contingent remainders; see *Peirce's Appeal*, 4 W. N. C. 439. This case, so far as it decides any question of law, must be regarded as the decision of

CLAYTON, P. J., of the Common Pleas, for the Supreme Court simply affirmed his decision, saying: "The steps by which this conclusion was reached are not essential."

Merger.

Merger of the inheritance and the particular estate will have the effect of destroying mesne contingent remainders, 4 Kent's Com. 254; Fearné Cont. Rem. 323; *Jordan v. McClure*, 85 Pa. St. 495; but where the particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same instrument, the contingent remainder is not destroyed; but the last limitation will be executed *sub modo* only, so as to open and separate itself from the particular estate and let in the contingent remainder on the happening of the contingency, *Lewis Bowles's Case*, 11 Co. 79 b; *Dennett v. Dennett*, 40 N. H. 498; Fearné Cont. Rem. 346; and so where the inheritance becomes united to the particular estate by an immediate descent from the person by whose will the particular estate and contingent remainders were limited, 4 Kent's Com. 254; Fearné Cont. Rem. 341; *Crisfield v. Storr*, 36 Md. 129; and this seems to be a necessary exception to the rule of merger, for otherwise, wherever there was a limitation by will to the heir of the testator with a contingent limitation over without any ulterior vested remainder, the particular estate would be merged at the moment of its creation, the contingent remainder destroyed, and the will *pro tanto* rendered void; see the remarks of KENNEDY, J., in *Bennett v. Morris*, 5 Rawle, at page 14; but where there is a devise for life with a contingent remainder for life over, and the first life tenant is the heir, while the mere descent will not destroy the contingent remainder, yet if the person seized for life and entitled to the reversion in fee make a conveyance in fee by deed of bargain and sale, the contingent remainder will be cut out by the merger, *Bennett v. Morris*, 5 Rawle 8.

Equitable Contingent Remainder not Variable by any Act of the Particular Tenant.

It is to be noted that equitable contingent remainders are not liable to destruction by any act of the tenant for life, Blackst. Com., Lib. 2, p. 172 (Sharswood's edition), Stewart's note; 4 Kent's Com. 254; Fearné Cont. Rem., p. 320.

Trusts to Preserve Contingent Remainder.

In view of the liability of a contingent remainder to be defeated by the premature termination of the particular estate, and of the fact that thereby the beneficent intentions of a grantor or deviser were very often prevented from taking effect, a means of preserving contingent remainders by the intervention of trustees was at an early date invented. The method adopted for the purpose of such preservation is to limit an estate to trustees and their heirs, to commence from the determination of the particular estate, by forfeiture or otherwise, in the lifetime of the tenant for life or during the time for which the particular estate is limited, and to continue during the life of the said tenant or until the time when the particular estate, if not for life, would by the terms of the limitation expire upon trust to support the contingent remainders and prevent them from being defeated or destroyed. By this means the trustees acquire a right of entry immediately upon the act of forfeiture or other premature determination of the prior limited estate, and so keep alive a particular estate until the occurrence of the contingency; see Thomas's note K. to 238 Co. Litt. a; *Vanderheyden v. Crandall*, 2 Denio 9; *Jackson ex d. Nicoll v. Brown*, 13 Wend. 437. This system, according to Blackstone, Blackst. Com., Lib. 2, p. 172, is said to have been invented by Sir Geoffrey Palmer and Sir Orlando Bridgman and other counsel. who during the times of the rebellion and commonwealth practised conveyancing, and who, after the restoration and their promotion to high legal office (Bridgman was Chief-Justice of the Common Pleas and Lord Keeper, and Palmer was Attorney-General and Chief-Justice of Chester), used their positions to introduce it into general employment. Trusts of this character are not executed by the statute of uses, *Vanderheyden v. Crandall*, 2 Denio 9. If trustees to preserve contingent remainders join in a conveyance to destroy them they are guilty of a breach of trust, and, generally speaking, if the purchaser take without notice of the contingent remainders, and for a valuable consideration, the remedy of the remainderman will be against the trustees, but if the conveyance be with notice the purchaser will take subject to the trusts, Fearn's Cont. Rem., p. 326. In this country, under our recording acts, of course the record would be constructive notice to the purchaser.

The trustees are within the cognizance of a court of equity, which, in a proper case, will control their acts or punish them for a breach of trust; it will, however, regulate its interference by the circumstances of the particular case before the Court; it may forbear to interfere, or may even allow or compel the trustees to join in destroying a contingent remainder, where it appears that such a measure will answer the uses originally intended in a settlement, 4 Kent's Com. 256.

Equity will not raise a trust to support remainders where it has not been created by the grantor, settler, or testator, see *Faber v. Police*, 10 So. Car. 376; nor will it extend the terms of a trust so as to render it capable of supporting contingent remainders; thus in *Hamilton v. The Monroe City Mutual Life Insurance Company*, 6 Lea 402, there was a trust for a husband and wife for life, with remainder to children, and a power of sale was given to the trustees exercisable by and with the concurrence of the life tenants; the Court held that in the absence of fraud the remaindermen could not control the trustees' discretion, and that a conveyance by the trustees would defeat the remainder.

Statutory Protection of Remainder when Particular Estate is Determined before the Occurrence of the Contingency.

By statute in New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 2, § 39, p. 2179; Michigan, Howell's Ann'd Stat., § 5550, p. 1444; Minnesota, Gen. Stat., Ch. XLV., § 34, p. 563; Wisconsin, Rev. Stat., § 2058, p. 616; California, Civil Code, § 5742, p. 682; it is enacted that a remainder valid in its creation shall not be defeated by the determination of the preceding estate before the happening of the contingency upon which the remainder is limited, and that if the contingency afterwards happen the remainder shall take effect.

Statutory Protection of Remainder against Acts of Particular Tenant.

It is also provided in some of the above States that no expectant estate shall be defeated or barred by any alienation or other act of the owner of the particular estate, or by any destruction of such preceding estate by disseizin, forfeiture, surrender, merger, or otherwise, but that an expectant estate may be defeated or barred by means provided or authorized by the creator of the estate. New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 2, §§ 32, 33; Michigan, Howell's Ann'd Stats., §§ 5548, 5549, p. 1444; Minnesota, Gen. Stat., Ch. XLV., §§ 32, 33, p. 563; Wisconsin, Rev. Stat., §§ 2056, 2057, p. 616.

Contingent Remainder not Conveyable Except by Estoppel.

A contingent remainder is not at common law conveyable by deed, *Hall v. Nute*, 38 N. H. 422; *Hayes v. Tabor*, 41 Id. 521; *Robertson v. Wilson*, 38 Id. 48; *Jackson ex d. Varick v. Waldron*, 13 Wend. 178; *Den ex d. Hopper v. Demarest*, 21 N. J. Law 525; *Miller v. Emans*, 19 N. Y. 385; and Kent says: "a contingent remainder is a mere right, and cannot be

transferred before the contingency happens otherwise than by way of estoppel," 4 Kent's Com. 260; Co. Litt. 352 a; *Peace v. Savage*, 45 Me. 90. A conveyance may, however, be worked by an estoppel or warranty, *Robertson v. Wilson*, 38 N. H. 48; *Fortescue v. Sattlethwaite*, 1 Ind. 566; *Hayes v. Tabor*, 41 N. H. 521; Fearné Cont. Rem. 365. A distinction has been taken with reference to the alienability of a contingent remainder resting upon the character of the contingency, in accordance with which it has been held that a contingent remainder is alienable when the event upon which it is limited is uncertain, but not when it is uncertain to whom the remainder is limited, or in whom it will vest, see *Moore v. Little*, 41 N. Y. 66; 2 Wash. R. P. 550; Preston Est. 76; Williams' Real Prop. 232, 4; but it is submitted, that in case the person in whom a contingent remainder may by possibility vest is unknown or nonexistent, there is no one to execute any conveyance of the remainder; and that if a person who *may*, on the occurrence of an event certain to happen, become entitled to the possession of an estate, although it is altogether uncertain that he will actually become so entitled, make a conveyance which is capable of acting under ordinary circumstances by way of estoppel, and he afterwards become entitled to the estate, he will be estopped from claiming as against his assignee. Thus, let there be a life estate to A., with remainder to B., C., D., and E., if and upon condition that they survive A., and if they do not so survive, then to F.; now it is uncertain whether B., C., D., or E., or any one of them, will ever take, or, if any, what proportion of the estate any survivor of A. will take; yet if C. should, by matter of record, convey the estate to X. during the lifetime of A., and should afterwards become the sole survivor of A., his conveyance to X. would be effectual to prevent any claim by C. as against X.

In *Hannon v. Christopher*, 34 N. J. Eq. 459, there was a devise to Mary Ann, Sarah, and Thomas by name, and to the survivor and his heirs. Sarah died. Thomas by a deed, which recited that by the death of Sarah the entire fee of the land devised had become vested in himself and Mary Ann, and recited also the terms of the devise, conveyed to Mary Ann all his estate. It was held that at the time of the conveyance Thomas had but a life estate with a contingent remainder in fee, but that he was estopped by his deed from setting up the truth, although the original devise was recited on the face of the conveyance, VAN VLEET, V. Ch., saying: "They were dealing with the fee. Thomas intended to grant to Mary Ann the fee-simple absolute and she expected to get it. That was the estate for which she paid her money, and that was the estate Thomas intended to convey to her."

Contingent Remainder Assignable in Equity.

A contingent remainder is assignable in equity, *Fearne Cont. Rem.* 366; 4 *Kent's Com.* 261; in *Bailey v. Hoppin*, 12 R. I. 560, one Burgess conveyed certain realty, upon trust that the trustee should apply the income to the support of the grantor and his wife during life, and, after the decease of the grantor and wife, should convey the estate to such of their children "who shall be living at the decease of the survivor, and such issue then living of any children who may then be deceased, . . . as or when such children shall respectively attain the age of twenty-one years, or die under that age. . . ." The wife, who survived her husband, did not die until 1879, all the children being then over twenty-one years old; in 1870 Arnold, one of the children, had conveyed his estate, with warranty, to one Wheaton, who devised the same to Hoppin as trustee. The Court held that in equity the contingent remainder of Arnold passed to Hoppin, trustee; *DURFEE, C. J.*, saying: "A Court of Equity does not stop in a case like the present to get itself entangled in the web of subtle refinement which renders the law of contingent remainders so perplexing to the common law lawyers, but, brushing them aside, it regards only the fact that the grantee of the deed has paid his money for it, and that he is therefore entitled in good conscience to have the fruit of it, though it may exist but in promise, not only conserved to him while living, but transmitted to his heirs and devisees. In equity, indeed, it is the executory contract for the future estate which is transmitted." And see *Bailey v. Ross*, 66 Ga. 354.

In Conveyance, by One having a Vested Estate and also a Contingent Remainder, of all his Right with Warranty, the Warranty will be Confined to the Vested Estate.

It may be noted that where a person is seized of a vested estate, and also of a contingent remainder, and conveys, with warranty, all "right, title, and interest," it has been held that the warranty will apply to the vested estate only, and will not affect the contingent remainder, *Blanchard v. Brooks*, 12 Pick. 47.

Rule that Contingent Remainder is not Transferable by Deed Abrogated in Certain States.

The rule that a contingent remainder is not transferable by deed except by way of estoppel is no longer the law in California, *Civil Code*, § 5699, p. 679; Michigan, *How. Ann'd Stat.*, § 5551; New York, *Rev. St.*, Pt. 2, Ch. 1, Tit. 2, § 35, p. 2178; Minnesota, *Gen. St.*, Ch. XLV., § 35; Wisconsin,

Rev. St., § 2059, p. 616 ; in which States it is enacted that expectant estates shall be descendible, devisable, and alienable as are estates in possession ; or in New Jersey, where the right is given to devise or convey a contingent remainder, provided that no person shall be empowered to dispose of any expectancy which he may have as heir of a living person, or any contingent estate or expectancy where the contingency is as to the person in whom, or in whose heirs, the same may vest or in any estate, right, or interest to which he may become entitled under a deed to be thereafter executed, or under the will of a living person, Stew. Rev. (1877), p. 168, Pt. 82. In Kentucky, the statute provides "any interest in, or claim to, real estate may be disposed of by deed or will in writing."

In New York it has been contended that the effect of Pt. 2, Ch. 1, Tit. 2, § 14 of the Revised Statutes (Throop's ed. 1882, p. 2176), which provides that the absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, and that such suspension for more than two lives should render the instrument working such suspension void, had the effect of so restraining the section above cited as to prevent the alienation of a contingent remainder ; but this position was negatived by the Court of Appeals, which said : "These provisions were not intended and do not operate to restrain alienation at all ; they are made and intended expressly to prevent such restraint, except within brief limits. They do not require that the contingent remainder may not be alienated, but only where contingent remainders are so limited that for a period not authorized an absolute fee cannot be conveyed, the future estate having this effect shall be void.

"Indeed, the alienation of the contingent remainder is entirely consistent with inability to convey an absolute fee. When the successive estates are all valid every person in being having any vested or contingent interest may often convey, and they may be entirely capable of conveying, and yet no absolute fee be conveyed. It is to prevent this for too long a period that the statute declares the effect of such a restraint of alienation," *Moore v. Little*, 41 N. Y. 66 ; as the statutes of Michigan, Minnesota, and Wisconsin are almost, if not entirely, verbatim copies of the New York statute, the above decision may probably be regarded as the proper interpretation of those statutes also.

And in Massachusetts and Maine the law is that whenever any contingent remainder, executory devise, or other estate in expectancy is so limited to any person that in case of his death before the contingency happens the estate would descend to his heirs in fee, such person may sell, assign, or devise the same subject to the contingency, Massachusetts, Pub. Stat. (1882), Ch. 126, § 2, p. 744 ; Maine, Rev. Stat. (1871), Ch. 65, § 9, p. 521.

Contingent Remainderman may Release.

A contingent remainderman may release his interest to one in possession, *Jeffers v. Lampson*, 10 Oh. St. 101; *Miller v. Emans*, 19 N. Y. 385; in the latter case the question was considered under interesting circumstances. There was a devise to several, and if any died without issue, his, her, or their share or shares to be divided amongst the survivors. A release was executed by some to others of the devisees of "all the right, title, interest, property, claim, and demand of any nature . . . of, in, or to the said lands, tenements, or hereditaments, and the reversion or reversions, remainder or remainders, rents, issues, and profits thereof." It was objected (1) that the words employed did not embrace the contingency of survivorship, and (2) that as bare possibilities the contingent remainders were not releasable. The Court, however, held that the release was good and effective by way of enlarging the estate and overruled the cases of *Pelletreau v. Jackson*, 11 Wend. 110, *Jackson ex d. Varick v. Waldron*, 13 Id. 178, and *Edwards v. Varick*, 5 Denio 664, so far as they conflicted with this view; SELDEN, J., in delivering the judgment of the Court, said: "In determining this question there are two separate principles to be considered. The first consists of that rule of policy which prohibits the granting or assigning of remote and contingent rights to real estate, in the same manner and for the same reason that the common law prohibited the assignment of choses in action, viz., because such transfers were thought to promote litigation. 'To prevent maintenance and the multiplying of contentions and suits, it was an established maxim of the common law that no possibility, right, title, or any other thing that was not in possession or vested in right, could be granted or assigned to *strangers*.' (But. and Har., Note 212, Co. Litt. 264, 266.) But the same policy which prohibited the transfers of these contingent rights to strangers tended to encourage their release to parties already possessed of some estate in the premises. By such a merger of rights the sources of litigation were obviously diminished. Accordingly, we find another annotator upon Coke and Littleton saying: 'With respect to the things that may be released it is a rule of law that no possibility, right, title, or thing in action shall be granted or assigned to a *stranger* on account of the danger of maintenance and of multiplying contentions and suits. But although a mere possibility cannot be released to a stranger, yet all rights, titles, and actions may be released to the terre tenant for securing his repose and quiet, and for avoiding contentions and suits,' Thomas's Coke, Note F, p. 456; Litt., § 446. The common law, therefore, favored the release of such rights to the terre tenant, and the remoteness of the contingency afforded no objection.

"The other rule alluded to is this, viz., 'that unless there be something in

esse to be released there can be no release;' a rule precisely analogous to that which holds that a thing to be sold is essential to a sale. There is no objection to a release to the terre tenant of a mere possibility, however remote, except that afforded by this latter rule, which has never, I apprehend, been applied to a case like this." The learned Judge then considered the case put in Littleton, § 446. "For if there be father and son, and the father be disseized and the son (living the father) releaseth by his deed to the disseizor all the right which he hath, or may have in the same tenements, without clause of warranty act, and after the father's death, etc., the son may lawfully enter upon the possession of the disseizor, for that he had no right in the land in his father's lifetime, but the right descended to him after a release made by the death of his father," etc.; and remarked that there the release, if it were to operate at all, had to operate *per mitter le droit*, because the releasee was a trespasser with a naked possession and no right, and hence to validate the possession a present right must have been transferred, and came to this conclusion: "Whenever this subject shall be fully examined it will, I think, be found that any and every contingent right, however uncertain, may be released to a party already seized of a present estate in premises in possession, and that the mere remoteness of this contingency affords no objection to its being so released, provided the right can be said to have any present existence at all;" and see *Redfern v. Middleton*, Rice Eq. 459.

Liability of Contingent Remainder to be Taken in Execution.

A contingent remainder cannot be taken in execution, *Robertson v. Wilson*, 38 N. H. 48; *Striker v. Mott*, 28 N. Y. 82. It is held otherwise in some States. Thus in Pennsylvania, in *Drake v. Brown*, 68 Pa. St. 223, AGNEW, J., said: "It is immaterial whether his interest in the property was vested or contingent it was liable to his debts, and by the sale of it, William Brown, the purchaser at the sheriff's sale, became entitled to it;" and in *White v. McPheeters*, 14 Reporter 370, the Supreme Court of Missouri held that a contingent remainder was both alienable and leviable upon in execution; and see *Bowling's Rep. v. Dobyn's Adm'r*, 5 Dana 434.

Descent of Contingent Remainder.

It has been said that a contingent remainder is not descendible; see *De Lassus v. Gatewood*, 71 Mo. 371; but the better statement of the law seems to be that where the person who is to take is fixed and the contingency is not with reference to his surviving the occurrence of the contin-

gency upon the death of the contingent remainderman, the remainder will pass to his heir, *Buck v. Lantz*, 49 Md. 439; *Barnitz's Lessee v. Casey*, 7 Cranch 469; *Snively v. Beavans*, 1 Md. 222; *Spence v. Robins*, 6 G. & J. 512; *Hopkins v. Jones*, 2 Pa. St. 69; *Chess's Appeal*, 87 Pa. St. 362; *Winslow v. Goodwin*, 7 Mete. 363 (overruling, so far as in conflict with it, *Denny v. Allen*, 1 Pick. 147); of course, if the survivorship of the devisee or grantee in remainder at the happening of the contingency is itself a contingency, the remainder cannot descend; see *Hennesy v. Patterson*, 85 N. Y. 91. Butler, in his note to *Fearne*, *c*, 364, thus succinctly states the rule: "A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, except the existence of the devisee of the contingent interest at some particular time may, by implication, enter and make a part of the contingency itself upon which such interest is intended to take effect."

As we have seen, there is a statutory provision for the descent of contingent remainders in New York, California, Michigan, Minnesota, Wisconsin, and Massachusetts (see *ante*, p. 371). In Georgia the provision of the Code follows the common law, and is as follows: "If the remainderman die before the time arrive for possessing his estate . . . his heirs are entitled . . . to a contingent interest when the contingency is not as to the person, but as to the event. If the contingency be as to the person, and that person not *in esse* at the time when the contingency happens, his heirs are not entitled," Code, § 2266, p. 556.

Contingent Remainders Devisable.

Contingent remainders, it seems, were formerly held not devisable by the person entitled thereto; but the course of decision afterwards took another course, and in *Roe v. Griffith*, 1 Blacks. 606, Lord MANSFIELD expressed himself as of opinion that wherever, in the case of a contingent, springing, or executory use, the person who was to take was so certain that it might be descendible, it was also devisable, and in *Moor v. Hawkins*, Lord NORTHINGTON, as quoted by Lord LOUGHBOROUGH in *Roe d. Perry v. Jones*, 1 H. Bl. 30, said he had never held a doubt that such contingent remainders were devisable since he was twenty-five years old. The question, however, was settled in *Roe d. Perry v. Jones*, which was removed upon a writ of error to the King's Bench, *sub nom. Jones v. Roe d. Perry*, 3 D. & E. 88, where the judges, Lord KENYON, C. J., ASHHURST, BULLER, and GROSE, JJ., were unanimously of the opinion that contingent uses were devisable. "The above authorities," says *Fearne*, after citing those noted above and others, "I apprehend, have, on solid grounds, established the

power of testamentary disposition of contingent and executory estates and possibilities accompanied with an interest; and of such as would be descendible to the heir of the object of those dying before the contingency or event on which the vesting or acquisition of the estate depended. But the decisions do not appear to reach those cases where neither the contingent interest itself is transmissible from any person until the contingency decides him to be an object of the limitation, nor the person or persons to or amongst whom the contingent or future interest is directed is or are in any degree ascertainable before the contingency happens, as in the case of a contingent or executory limitation to the right heirs of J. S. (then living), where the description of the person to take cannot be confined to or among any ascertainable person or persons during the life of J. S.; nor can it therefore be said in whom such interest is; nor, consequently, that it is in anybody during that period; nor will it be transmissible or descendible from any one dying before it becomes vested," *Fearne Cont. Rem.*, p. 371.

The law in this country may, we think, be taken as following the law in England, and every remainder which is descendible may be considered as devisable likewise.

The statutory provisions on this subject of the States of Massachusetts, New York, New Jersey, Michigan, California, Wisconsin, Minnesota, have been previously noticed in connection with the statutes.

Contingent Remainder will Prevent Partition except when Permitted by Statute.

Except where a statute intervenes, the existence of a contingent remainder will prevent the partition by legal proceedings of the real estate, *Gest v. Way*, 2 Whart. 445; but in New York the contingent interest of persons not *in esse* is barred by a sale in partition, *Mead v. Mitchell*, 17 N. Y. 210; *Clemens v. Clemens*, 37 Id. 59; *Noble v. Cromwell*, 27 How. Pr. 289; *Brevoort v. Grace*, 53 N. Y. 245; *Chism v. Keith*, 8 N. Y. S. C. 589 (S. C. *sub nom.* *Chinn v. Keith*, 4 T. & C. 126).

And it has been held that where lands are limited in trust, the existence of a contingent remainder will prevent the granting of a petition for the sale of the land and reinvestment of the proceeds upon the same trust, *Justice v. Guion*, 76 N. C. 442; *Watson v. Watson*, 3 Jones Eq. 400. The Court, by BATTLE, J., said in response to an application for the sale of land where there was a remainder to persons not *in esse*: "The difficulty consists in there being no persons in existence for whom the Court can be called upon to act. It was the will of the testator to give only a limited estate to the first taker, leaving the most valuable interest in property to be enjoyed by

those who are *in posse* but not *in esse*. It would defeat that will, to some extent at least, if the real estate were converted into personal, and that any court would be reluctant to attempt to do unless it were entirely satisfied of its power to act. . . . The cases in the English courts, cited by the plaintiff's counsel, wherein decrees have been made in causes concerning land in which the tenants in tail only without the remaindermen were made parties, do not apply, because the rule was adopted for convenience, the remaindermen being considered mere ciphers on account of the power of the tenant in tail over their estate."

In New Jersey, the sale in a proper case of land limited over is permissible by statute, *Herring's Case*, 35 N. J. Eq. 359.

In Tennessee, it is provided that where a sale is made by the chancery of the lands of persons under disability remaindermen not *in esse* are barred if all living parties in interest are joined, Stats. (1871), § 3337, p. 1408.

There is in Massachusetts a provision for the sale and mortgage of estates, subject to the rights of a contingent remainderman, Pub. Stat. (1882), Ch. 120, §§ 19-21, p. 734.

Waste Enjoined at Suit of Contingent Remainderman.

While a contingent remainderman has no positive or certain interest in the land limited, he still has such an interest as will in certain cases authorize him to interfere to protect the property; while, therefore, he cannot maintain a bill for an account of past waste, he may have an injunction to enjoin future voluntary waste, but in such case all persons having an interest should be joined in the bill, *Cannon v. Barry*, 59 Miss. 289.

Void Remainder does not Affect Preceding Estates.

A limitation in remainder which is void does not affect preceding estates either by way of diminution or enlargement, *Heald v. Heald*, 56 Md. 300; *Goldsborough v. Martin*, 41 Id. 488; *Deford v. Deford*, 36 Id. 168; *Wood v. Griffin*, 46 N. H. 230.

Effect of Failure of Contingency Attached to Previous Estate or Subsequent Contingent Remainder.

The effect of the failure of a contingency annexed to a precedent estate upon a subsequent limitation, depends upon whether the taking effect of the precedent estate be, or be not, a condition precedent to the vesting of the subsequent limitation. Mr. Thomas, in his note to Co. Litt. 378 a,

states after Fearne three classes of cases, which, with a slight change of phraseology, are as follows: 1st. Where there is a limitation after a preceding estate, which depends upon a contingency which never takes effect. In such a case, the determination of the question whether the contingency is to be restricted to the estate to which it is primarily attached, or is to be extended farther so as to affect the subsequent limitation, must be governed by the testator's intent. But if the testator makes no apparent distinction in this respect, between the first and the succeeding estates, the contingency will be held to affect the whole train of remainders, *Doe d. Watson v. Shipphard*, Dougl. 75, Fearne Cont. Rem. 236. 2d. Where there is a limitation over, on a conditional contingent determination of a preceding estate, and such preceding estate never takes effect. In such case, the remainder will take effect. See *Avelyn v. Ward*, 1 Ves. 422, in which case Lord HARDWICKE said that he knew of no case of a remainder or conditional limitation over, whether by way of a particular estate, so as to leave a proper remainder or to defeat an absolute fee, before limited by a conditional limitation, but what if the precedent estate, by what means soever, should be out of the way, would take effect. 3d. Where the limitation over is upon the determination of a precedent estate by a contingency which, though the precedent estate takes effect, never happens. Here, though, if the preceding estate never takes effect the remainder will take effect, yet if it take effect and the contingency do not happen, the remainder will not take effect on the expiration of the preceding estate unless in a case of creation of remainder by devise the intention of the testator apparently calls for it.

Cross Remainder.

HAWLEY v. NORTHAMPTON.

Supreme Judicial Court of Massachusetts, Hampshire, September Term, 1811.

[Reported in 8 Massachusetts 3.]

A. devises sundry parcels of land to his nephews B. and C. severally and in distinct parts, to have and to hold the parts devised to B., *to him, his heirs and assigns forever, on the conditions and limitations after in his will mentioned*: and to have and to hold the parts devised to C., *to him, his heirs and assigns forever, on the conditions and contingencies after mentioned in his will*. The testator then adds, "and it is my will and pleasure, and I have made the foregoing devises and bequests with the provision and limitation that if it should so happen that the said B. should decease *leaving no heirs of his body lawfully begotten*, and the said C. *or any heirs by him the said C. lawfully begotten* then alive, that in such case all the devises and bequests of real estate hereinbefore made to the said B. should be and remain to him the said C. *or such his said heirs*. And in case the said C. should decease *leaving no heirs of his body begotten living*, the said B. *or any heirs of his body lawfully begotten*, in such case all the lands hereinbefore devised to the said C. shall be and remain to the said B. or such his said heirs. But in case both the said B. and C. should decease leaving no heirs of either of their bodies begotten, then all the lands hereinbefore given to the said B. and C., or either of them, *shall be and remain to the children of my brethren and sister who shall then survive*." This was held to be a devise to the two nephews in tail with cross remainders in tail, and a contingent remainder to the children of the testator's brethren and sister living when these estates tail should be spent.

THE plaintiffs in error, being the children and heirs-at-law of Moses Hawley deceased, brought this writ of error, September Term, 1808, to reverse a judgment of this Court rendered in May, 1792, in favor of the defendants in error against the said Moses.

The original action was *entry sur disseizin*, brought by the said Moses Hawley, counting on his own *seizin* in fee, and upon a disseizin by the said inhabitants, in which he demanded sundry parcels of land in said Northampton, and also one undivided third part of certain other parcels of land within the same town. Upon not guilty pleaded, the jury

returned a special verdict, finding among other things a common recovery theretofore suffered by Joseph Hawley, Esq., under whose last will the said inhabitants claimed to hold the demanded premises, and upon which verdict they obtained their judgment.

At the term of this Court holden in September, 1809, the defendants in error pleaded the general issue, *in nullo est erratum*, and the cause coming on to be heard,

Bliss, for the plaintiffs in error, suggested that the verdict did not find the common recovery to have been executed, which he contended to be necessary. After some discussion of this question, a copy of the record of the common recovery being produced, and it appearing to have been duly executed, the parties agreed that the former judgment should be reversed, and a *venire facias de novo* be awarded.

Accordingly at the succeeding term, April, 1810, a new trial was had, and a special verdict was found, in substance as follows:

The jury find, that long before the time when the disseizin alleged in the original declaration is supposed to have been done, to wit, on the 29th day of July, 1751, one Ebenezer Hawley was seized in his demesne, as of fee, of the lands, tenements, and hereditaments named in the declaration, and being so seized, on the day and year aforesaid, at Northampton aforesaid, made and published his last will, duly executed and attested to pass lands; whereby the said Ebenezer devised, among other things, as follows:

“Further, I give to my said wife the whole use and income and improvement of my house, barn, and house-lot, and one-half of all my land lying in the common field or meadow so called, in said Northampton, and of one-third part of my out or wood lands, for and during the term of her natural life, and no longer. And I give the one-half of,” etc. [*designating sundry parcels of the land contained in the common field or meadow, and of which he had before devised one-half to his wife for life*], “to the said Elisha Hawley” [nephew to the testator], “immediately to be possessed after my decease; and the remainder of the other half of all and each of the last said lots, and the remainder of my homestead, with the buildings thereon, to come into possession immediately after my wife’s decease. To have and to hold to him the said Elisha Hawley, his heirs and assigns forever, on the conditions and contingencies hereinafter mentioned.—Also I give to the said Elisha Hawley” [*designating another specific parcel of land*] “for and during

the term of my said wife's life, and no longer.—Also I give to the said Joseph Hawley, my nephew, the one-half of” [*designating sundry other parcels of the land, of which he had before devised the one-half to his wife for life*], “in possession immediately on my decease, and the remainder of the other half of all the last mentioned lots or pieces of land, and the remainder of the whole of the before mentioned lot, which my said wife and the said Elisha Hawley are to have the use of during the life of my said wife; to come into his possession immediately on my said wife's decease. To have and to hold to him the said Joseph Hawley, his heirs and assigns forever, on the conditions and contingencies hereinafter mentioned.—Also I give all my woods or outlands to the said Joseph Hawley and Elisha Hawley, two third parts thereof in immediate possession, and the possession of the other third part thereof expectant on my wife's decease: to have and to hold the one third part of all my said woodlands to him the said Joseph Hawley, his heirs and assigns forever, on the condition hereinafter expressed; and the other two third parts of said woodland to him the said Elisha Hawley, his heirs and assigns forever, on the condition and under the limitation hereinafter expressed.—And it is my will and pleasure, and I have made the foregoing devises and bequests with this provision and limitation, that if it should so happen that the said Joseph should decease leaving no heirs of his body lawfully begotten, and the said Elisha, or any heirs by him the said Elisha begotten then alive, that in such case all the devises and bequests of real estate hereinbefore made to the said Joseph should be and remain to him the said Elisha, or such his said heirs:—and in case the said Elisha should decease leaving no heirs of his body begotten living, the said Joseph, or any heirs of his body lawfully begotten, in such case all the lands before herein devised to the said Elisha shall be and remain to the said Joseph, or such his said heirs:—but in case both the said Elisha and Joseph should decease, leaving no heirs of either of their bodies begotten, then all the lands hereinbefore given to them the said Joseph and Elisha, and either of them, shall be and remain to the children of my brethren and sister who shall then survive.”

The jury further find, that the said Ebenezer continuing so seized, on the 18th of August, 1751, died without having altered or revoked his said will, which was afterwards duly proved.

They further find, that upon the death of the said testator, his said

widow and his two nephews aforesaid severally entered into such parts of the premises, so as aforesaid devised to them, as by law they were authorized to enter into, and became severally seized of such estates in the devised premises as could lawfully pass to them by the said will. And being so seized, the said Elisha, on the 24th of September, 1755, died without having had issue of his body: and thereupon the said Joseph entered into that part of the premises devised as aforesaid to the said Elisha, and became and was seized of such an estate therein as could lawfully pass to the said Joseph by the said will upon the death of the said Elisha as aforesaid.—And the said widow of the testator, being so seized, died on the 2d of March, 1781, whereupon the said Joseph entered into all that part of the premises devised to her as aforesaid, and became and was seized of such an estate therein as might lawfully pass to him upon the death of the said widow, and the death of the said Elisha without issue as aforesaid.

They further find, that after the death of the testator's widow and of the said Elisha, to wit, in the year 1783, the said Joseph, being so seized of such an estate in the demanded premises as might lawfully pass as aforesaid by the will of the said Ebenezer to him, at a Court of Common Pleas holden at Northampton on the last Tuesday of August in the same year, suffered a common recovery, with single voucher and duly executed, of the lands, tenements, and hereditaments named in the declaration, to his own use in fee-simple, in due form of law, and thereupon entered, etc., and became and was seized, as the law requires, of such an estate therein as by law might or could pass to him by virtue of the said will and the said common recovery suffered and executed as aforesaid.

They further find, that the said Joseph, so seized as aforesaid of all the lands, tenements, and hereditaments named in the declaration, on the 27th of September, 1783, made and published his last will duly executed and attested to pass lands in the words following, viz.: "Whereas the fee-simple in and of the lands and tenements, which my honored uncle, Ebenezer Hawley, formerly of Northampton, in the county of Hampshire, deceased, died seized of, has lately accrued to me, Joseph Hawley, of the same Northampton, Esquire, by virtue and by force of a common recovery suffered by me to be had of the said lands and tenements by my trusty and worthy friend Capt. Samuel Clark, of Northampton aforesaid, in and at the last session of the Court of

Common Pleas held at the said Northampton, within and for the aforesaid county of Hampshire, on the last Tuesday of August last; of which lands and tenements until then I was tenant in fee-tail, and since the aforesaid session, the said recovery executed, and also by virtue of a bargain and sale of the same lands and tenements *bona fide* made to me by the said Clark, by his deed duly executed and registered in the registry of deeds for the said county of Hampshire.

“I, the said Joseph Hawley, because of the great uncertainty of human life, and because I am not at present sufficiently advised to make any other disposition of the aforesaid lands and tenements, and being of sound and disposing mind and memory (blessed be God), on this twenty-seventh day of September, A. D. 1783, do give and devise all the said lands and tenements mentioned or described in the writ of entry whereon the said common recovery was suffered, excepting such parts of them as I have heretofore, or shall before my decease, by deed or deeds executed, convey to others; I say I do hereby give and devise all the said lands and tenements (excepting as is above excepted) to the inhabitants of the above town of Northampton, in their corporate capacity as a town. To have and to hold the above devised premises, with the appurtenances, in their corporate capacity as a town, to them and their successors forever, to be holden forever without distribution, by the town which the general Court of Massachusetts shall consider and deem to be the same corporation as the present town of Northampton in the county of Hampshire, however the present township of Northampton may hereafter by the general Court be divided.—And I most heartily recommend to the said town, that they should carefully see to it that the schools, as the laws of this commonwealth do or shall require the said town to maintain, be supported and maintained in a steady and liberal manner, and by faithful and able masters taught and instructed; an affection to learning and the good education of the successive generations of the lads of Northampton being a great motive to the making this devise, as well as hearty benevolence to the town where I was born and lived most of my days, and which has seen fit from the early days of my manhood to honor me with many instances of their respect, esteem, and confidence.—In witness whereof I, the said Joseph Hawley, after appointing the town clerk of the said Northampton for the time being executor of this testament, have hereunto set my hand and seal the day and year above written.”—And continuing so seized as

aforesaid, the said Joseph, on the 10th of March, 1788, died without leaving issue of his body, and without having altered or revoked his said will, which was afterwards duly proved and approved.

The jury further find, that all the lands, tenements, and hereditaments named in the declaration are parcel of the lands, tenements, and hereditaments described and devised in the will of the said Ebenezer, and the will of the said Joseph; and that the said Joseph never made any other disposition of the demanded premises, or any part thereof, than is made by the said last will and testament of the said Joseph; and that the said inhabitants, after the death of the said Joseph as aforesaid, entered into the demanded premises under and by virtue of the will aforesaid of the said Joseph, claiming to hold the same in fee-simple, and became and were seized of such an estate in the same, as by law could pass to them by the said will of the said Joseph. And they the said inhabitants being so seized, the said Moses, the demandant, entered into the same premises after the death of the said Joseph, and before the commencement of his action, and ejected the said inhabitants, and became and was seized of such an estate therein as might lawfully pass to the said Moses after the death of the aforesaid widow and of the said Elisha and Joseph; and thereupon the said inhabitants re-entered into the said premises, and expelled the said Moses therefrom, and became and were seized of such an estate therein as might lawfully pass to them upon the death of the said Joseph by virtue of his last will aforesaid.

They further find, that Joseph Hawley, Samuel Hawley, Thomas Hawley, and Lydia Dwight, once Lydia Hawley, were the brothers and sister of the said Ebenezer, the testator; that the said Joseph and Elisha Hawley, named as devisees in the said will of the said Ebenezer, were children and only heirs at law of Joseph Hawley deceased, the brother of the said Ebenezer; that Moses Hawley the demandant, Dorothy Kellogg and Lydia Morton were children and only heirs at law of Samuel Hawley deceased; that Elijah Hawley, Hannah Benedict, Lydia Beers, and Abigail Birdsey were the children of the said Thomas Hawley deceased; that Joseph Dwight, Josiah Dwight, Simeon Dwight, Seth Dwight, Elisha Dwight and Anna Pynchon were the children of the said Lydia Dwight deceased; that the said Samuel Hawley and Thomas Hawley survived the said Ebenezer; and that the said Elisha Hawley, Hannah Benedict, Lydia Beers, Abigail Bird-

sey, Lydia Morton, Moses Hawley, Dorothy Kellogg, Elijah Dwight, and Anna Pynchon were the only children of any brother or sister of the said Ebenezer living at the death of the said Joseph Hawley, the devisee aforesaid, and were heirs at law of the said Joseph last named, at the time of his death; and that the said Samuel Hawley, Thomas Hawley, Joseph Hawley, the devisee aforesaid, Elisha Hawley, Joseph Dwight, Josiah Dwight, Simeon Dwight, Seth Dwight, Elisha Dwight, and Anna Pynchon were the only heirs at law of the said Ebenezer at the time of his death; that the said Joseph Hawley, the devisee as aforesaid, was the only heir at law of his brother the said Elisha; and that neither the said Samuel Hawley, Thomas Hawley, or Lydia Dwight, survived the said Joseph Hawley, devisee as aforesaid under the will of the said Ebenezer:

But whether the said inhabitants committed the disseizin alleged against them by the said Moses, the jurors aforesaid are wholly ignorant, and thereof pray the opinion of the Court here. And if the Court shall be of opinion, upon the whole matter, that the said Moses Hawley was entitled to recover any part of the demanded premises as devisee under the said will of the said Ebenezer, then they find that the said inhabitants did disseize the said Moses of, etc.—if the Court shall be of opinion that the said Moses was entitled to recover any part of the demanded premises as heir at law of the said Ebenezer, then they find that the said inhabitants did disseize the said Moses of, etc.—but if the Court shall be of opinion that the said Moses was not entitled to recover any part of the demanded premises, either as devisee or heir at law of the said Ebenezer, then they find that the said inhabitants did not disseize the said Moses, etc.

At the next term it was proposed by *Bliss* and *L. Strong*, the counsel in this action, to furnish the Court with their respective points and authorities, instead of a *viva voce* argument at the bar. This was approved by the Court, and the reporter thinks he cannot more gratify the profession than by transcribing the manuscripts of the counsel; in which as much brevity has perhaps been used, as was consistent with full justice to their respective arguments.

L. Strong, for the defendants in error.—The inhabitants of Northampton derive a legal title to the land in dispute, under the will of Ebenezer Hawley, and the common recovery suffered by Joseph Haw-

ley. In support of this opinion we rely upon the following propositions; at the same time remarking, that the argument now urged is not materially different from that delivered previous to the original judgment, except in its arrangement and the addition of some new points and authorities.

I. In all conveyances, words, that would carry a fee, may be so restrained by subsequent words, as to give only an estate tail.

1. In common law conveyances.*

2. In a will.†

The case, when lands are given to *a man and his heirs*, and *if he die without issue*, remainder over, is sometimes spoken of, by way of illustration, as the common case of an estate tail.‡

Even at common law, therefore, if lands be conveyed to *a man and his heirs*, or to *one his heirs and assigns*, and *in default of issue*, or *if he die without issue*, or *without heirs of his body*, then over, the feoffee takes only an estate tail; and in the case of wills, if the limitation over be by the words, *if he die without leaving issue of his body*, the devisee takes a life estate, although the estate devised be charged with the payment of an annuity.

II. When lands are given to a man and his heirs, or to one his heirs and assigns, with remainder over upon failure of issue, if the failure of issue be not confined to a life in being, or a limited term of years afterwards, the estate is a fee tail.

If the first proposition be established, the truth of the second results from the necessity of carrying into effect, so far as it can be done consistently with the rules of law, the obvious intention of testators; since it is a rule well known and settled, that

III. An executory devise must necessarily vest within a life or lives in being, or twenty-one years and the fraction of a year afterwards.§

IV. A devise of lands to one and his heirs, or to one, his heirs and assigns, and *if he die without issue*, or *without leaving issue*, or *leaving no issue*, then over; such directory words are construed to be words of

* *Lee v. Brace*, 5 Mod. 266. Co. Lit. 21 a. Plowden 541. *Cotton's Case*, 3 Leon. 5.

† *Holmes v. Meynell*, Sir T. Ray 453. *Wilson v. Kipping*, Ibid. 426. *Chadock v. Cowley*, Cro. Jac. 695. *Nottingham v. Jennings*, 1 L. Raym. 568. *Barnard et al. v. Reason*, 3 Wils. 244. *Morgan v. Griffith*, Cowp. 234. *Geering v. Shenton*, Ibid. 410.

‡ *Law v. Davis*, 2 Strange 850.

§ *Long v. Blackall*, 7 D. & E. 100. *Thelusson v. Woodford*, 4 Bos. & Pul. 392.

limitation, and to intend an indefinite failure of issue, and the devise over can take effect only as a remainder.

1. They are words of limitation. This appears from the cases already cited, as it respects the words *without issue* and *without leaving issue*. And it was holden in *Forth v. Chapman*,* and in *Atkinson v. Hutchinson*,† that there was no difference between a dying *without leaving issue* and *leaving no issue*. So where a testator, in case his eldest son should die and *leave no issue of his body*, after his decease gave the lands to his youngest son and his heirs; it was held that the eldest son took an estate tail by implication, and that the devise to the youngest son was a remainder.‡ The words, then, *without issue*, *without leaving issue*, or *leaving no issue*, are all to be construed as words of limitation, and to give the first devisee an estate tail, unless they confine the failure of issue to a life in being, and a limited term of years afterwards. But

2. They intend an indefinite failure of issue. In a *formedom in remainder* or *reverter*, whenever the issue of the first donee fail, he is said to have died without issue.§ And probably in allusion to this circumstance, when lands are given to a man and his heirs, and if he die without issue, remainder over, the words *dying without issue*, though in common parlance they are understood a dying without issue at his death, denote a failure of issue at an indefinite future period.

For many years after executory devises were introduced, the construction of expressions respecting a failure of issue, when applied to terms and chattel interests, was frequently varied; and at no period has it been perfectly uniform; yet the construction of those expressions has been generally the same with respect to real estates. In the latter part of Queen Anne's reign, the courts took a distinction between devises of terms and of freeholds: determining that in the latter case the words, *if he die without issue*, are inserted in favor of the issue, and must intend an indefinite failure of issue; but in the former they could not have been inserted in favor of the issue, as the father takes the whole term, which will not go to his issue, but to his executor, and must therefore limit the dying without issue to the time of the death.|| The same distinction was taken in *Forth v. Chapman* and *Atkinson v. Hutch-*

* 1 P. Will. 664.

† 3 P. Will. 259.

‡ *Walter v. Drew*, Com. Rep. 372.

§ *Buckmere's Case*, 8 Rep. 88 a.

|| *Target v. Gaunt*, 1 P. Will. 432, 564. Eq. Abr. 362.

inson, and has been recognized by Lord Mansfield,* Lord Hardwicke,† and Lord Kenyon.‡ Many other cases may be cited as in point.§

From an examination of the authorities now cited it will appear, that the words, *if the said G. happen to die without issue,—if W. should depart this life not having issue,—in case all my said children should die without leaving any issue,—if the said S. should happen to die without leaving issue of his body,—in case T. should leave no such child or children,—if A. should die and leave no lawful heir,—if either of my nephews shall depart this life and leave no issue,—in case my said son shall die and leave no issue of his body,—*have all been construed to intend an indefinite failure of issue.

Powell, in his edition of *Fearne on Executory Devises*,|| after stating a number of cases upon this subject, thus proceeds: “The conclusion from these authorities has been, that the words, *dying without leaving issue*, shall have the same construction as the words *dying without issue*, in the limitation of real estates, whenever the limitation over can take effect as a remainder under that construction. It is a decision founded on the established doctrine, laid down by Sir Matthew Hale, in the great case of *Purefoy v. Rogers*, and resorted to, recognized and proceeded upon by all the courts in many subsequent decisions.”

The devise over, therefore, can take effect only as a remainder, since it must take effect, if at all, as a remainder by way of executory devise; and it is a well established rule that

V. Where an estate can take effect as a remainder, it shall never be construed to be an executory devise.¶

VI. The words used in the will of Ebenezer Hawley are tantamount to those used in the fourth proposition, and should receive a similar construction.

1. This should be the construction of the words limiting the estate over upon the death of Joseph and Elisha.

It will probably be agreed, that the words, *heirs of the body*, are in all instances as effectual to create an estate tail, as the word *issue*, and

* *Geering v. Shenton*, Cowp. 410.

† *Sheffield v. Lord Orrery*, 3 Atk. 288.

‡ *Goodtitle v. Pegden*, 2 D. & E. 720.

§ *Lee's Case*, 1 Leon. 285. *Southey v. Stonehouse*, 2 Vern. 610. *Daintry v. Daintry*, 6 D. & E. 314, and *Walter v. Drew* and *Goodtitle v. Pegden*, before cited.

|| 2 *Fearne's Exec. Devises*, 5th Edit. 200.

¶ *Purefoy v. Rogers*, 2 Saund. 388. *Wood v. Baron*, 1 East. 259.

sometimes more so; since they are the technical words of limitation; and the word *issue* is as often used as the word *children*; and is sometimes a word of purchase, when the word *heirs* would not be.*

Here the words are, "in case both the said Joseph and Elisha should decease," etc. One devised a messuage to Alice his daughter and her heirs, another messuage to Thomasin his daughter, then eight years old, and her heirs; and if she died before she attained the age of sixteen years, living Alice, then he willed that Alice should have Thomasin's share to her and her heirs; and if Alice died having no issue, living Thomasin, that Thomasin should have and enjoy Alice's share to her and her heirs; and if *both daughters should die having no issue*, a devise over to T. S. and his heirs: and it was holden that these were estates tail, and not conditional fees.† If the testator then, in the case at bar, had said, *if the said Joseph and Elisha shall decease without heirs of their bodies*, it might well be conceded, that the limitation over would have been on a contingency too remote. But it has been shown, that no difference exists between the words, *without issue*, *without leaving issue*, and *leaving no issue*; and that the words, *heirs of the body*, are even less restrictive in their operation than the word *issue*. The conclusion therefore is obvious, that "*leaving no heirs of either of their bodies begotten*," intends an indefinite failure of issue in Joseph and Elisha, unless other words are to be found in the will, which would confine this otherwise general dying without issue to a life in being.

Should it be contended, that the limitation over was to persons in *esse*, and thus, in the contemplation of the testator, to take effect during a life in being; we answer, 1. That under the word *children* the testator's *grandchildren* might have taken, if his immediate children had been all dead.‡ And it has been determined, that a devise to children, if it be an immediate devise, relates only to children in *esse* at the time; but if a devise be limited to children by way of remainder, or upon a contingency, which, in the contemplation of the testator, is uncertain when it may take place, if it ever happen at all, it is not confined to those in being at the making of the will, but includes those that are

* *Lisle v. Pullin*, 2 Strange 731. *Backhouse v. Wells*, 1 Eq. Abr. 184. 1 Fearn's Ex. Dev. 5th ed. 233.

† *Clatch's Case*, Dyer 330 b. *Barnfield v. Welton*, 2 Bos. & Pul. 326.

‡ *Crooke v. Brooking*, 2 Vern. 2, 107. *Wythe v. Thurlston*, Amb. 55. 2 Fearn 361. *Gale v. Bennett*, Amb. 681. 3 Ch. Rep. 86.

born after the testator's death.* 2. In many cases, where the limitation over was to one in *esse*, that circumstance has not varied the result.† 3. It is by no means certain, that the persons, who should be adjudged capable of taking under the word *children*, would take only estates for life.

It may possibly be said, on the authority of a note of Douglas, in *Doe v. Fonnereau*,‡ that a double contingency may be implied; as Douglas says “a double contingency, as the expression is used in that case, is where an estate in trust or by executory devise is so limited, that the time, when it is to vest in possession, will in one event fall within the limits allowed by law, and in another will exceed them.” But it is plain that the case does not justify that definition. In a double contingency, the time will in neither event exceed the limits allowed by law. In one event it will take place as a remainder, and in the other, *viz.*, the absolute failure or non-existence of a precedent estate, as an executory devise.§

2. The same construction should take place in reference to the words limiting the estate to Joseph and Elisha.

1. As to their *immediate* estates. It has already appeared that, had the devise been to them, their heirs and assigns, and if they died *leaving no issue*, then over, they would have taken estates tail; and that the words *leaving no heirs of the body begotten* are equipollent to the words *leaving no issue*. If therefore the construction of this clause be different, that difference must arise from additional words, tending to show the intention of the testator to give a fee-simple, or to limit the dying without issue to a life in being.

We say, in the first place, that there are no such words tending to show the intention of the testator to give a fee-simple. The use of the word *assigns* can make no difference in the construction, as appears from the cases cited under the fourth proposition, where indeed the same word is made use of, and from the case of *Scot v. Smart* before cited. In *Ellis v. Ellis*|| Lord Ellenborough observed, that “as to the word *assigns*, which follows heirs, we cannot collect any different intention from the addition of it, than if the word *heirs* alone had been used: for

* *Baldwin v. Karver*, Cowp. 314.

† *Wilson v. Kipping*, T. Raym. 426. *Chadock v. Cowley*, Cro. Jac. 695. *Scot v. Smart*, cited 2 Fearne 204.

‡ Doug. 504.

§ 2 Fearne 496. Cowp. 314.

|| 9 East. 382.

whether an estate be given to a man and his heirs, or to him and his heirs and assigns, must be the same thing in legal construction."

In the second place, there are no additional words in this will, which can be construed to limit the dying without issue to a life in being. Had the testator said that in case the said Elisha should decease, leaving no heirs of his body lawfully begotten, living the said Joseph, the case would be precisely that of *Pells v. Brown* :* but then his intention would not have been expressed. He therefore very properly says, *living the said Joseph, or any heirs of his body lawfully begotten*, thus making the failure of issue indefinite.

It may perhaps be said, that this estate is limited over to Elisha upon Joseph's death, "leaving, etc., and the said Elisha or any heirs of his body *then* alive ;" and that *then* and *when* are adverbs of time ; and that *then* in this will must refer to the time of Joseph's death. But upon examining the case, upon which that idea was thrown out by Lord Kenyon,† and other like cases,‡ and comparing the different limitations to Joseph and Elisha, the objection, although the word *then* be used here as an adverb of time, will appear to be unfounded.

It is evident therefore that Joseph and Elisha took estates tail, part thereof in possession, and part in remainder after the widow's life estate.

2. What estate vested in Joseph upon Elisha's death? We answer an estate tail: for as Joseph and Elisha *immediately* took estates tail, we contend that for the same and additional reasons they took cross remainders in tail.

Testator devises Blackacre to T. and his heirs, and Whiteacre to F. and his heirs. *Item. I will that the survivor of them shall be heir to the other.* T. and F. took cross remainders in tail.§—Devise of all my lands in M. unto my two daughters E. and A. and their heirs equally to be divided ; and in case they happen to *die without issue*, then over : held that E. and A. have cross remainders.|| So where A. seized of lands had issue, two sons, and devised part to his eldest son in tail, and the other to his younger in tail, with this clause in the will, "that if *any* of his said sons died *without issue*, that *then* the whole land should remain to a stranger in fee." It was adjudged that upon the younger son's

* Cro. Jac. 590.

† *Wilkinson v. South*, 7 D. & E. 557.

‡ *Ellis v. Ellis*.

§ *Chadock v. Cowley*, Cro. Jac. 695.

|| *Holmes v. Meynell*, Th. Jones 172.

dying without issue, the eldest son should have the land by implication.* In the case at bar, the words are, "in case both should decease, etc., *then all the lands herein* before given to them the said I. and E. shall be and *remain*," etc. : and it has frequently been decided, that wherever cross remainders are to be raised by implication between two and no more, the presumption of law is in favor of cross remainders.†

But here the cross remainders are express. The estate was to continue in Joseph and Elisha, and the heirs of their bodies, so long as any of them were in being, and no part of it was to go over until a failure of issue in both. Should it be determined, that the testator gave a fee-simple to Joseph and Elisha, and afterwards, upon Elisha's death, a fee-simple to Joseph and Elisha's share, the devise must be read thus,—“if Elisha shall die, leaving no heirs of his body begotten, living Joseph or any heirs of his body begotten, the land given to Elisha shall be and remain, by executory devise in fee-simple, to Joseph, if alive, but if Joseph should be dead, and any heirs of his body alive, Elisha's part shall be and remain, by executory devise in fee-simple to the heirs of the body of Joseph. And if the said Joseph shall die,” etc., in the same manner. Such cross executory devises were never heard of; and the mere statement of the case must show that these are cross remainders. Besides, had the testator intended an executory devise, he would not in every instance have used the word *remain*,‡ but another word expressing a different idea.

Should it be objected that, as in case of Joseph's failure of issue, the testator directs that *all the devises and bequests of real estate shall be*, etc., to the said Elisha or such his said heirs, this furnishes an argument, that the *children* of Elisha would have taken a fee-simple by purchase;—we reply, that the plaintiffs in error can have no possible interest in this objection; since were the estate given to Joseph but a life estate, the limitation over upon Joseph and Elisha's dying, *leaving no heirs of either of their bodies*, would enlarge that estate for life to an estate tail; and if the words “*all the devises*,” etc., or rather “*all the lands*” would carry a fee, the plaintiffs are claiming by virtue of an executory devise, so constructed, as to vest, if at all, after an indefinite failure of issue. But there is no ground for making it, since the word *or* is frequently

* 4 Leon. 14, cited in Sir T. Raym. 454.

† *Perry v. White*, Cowp. 780. *Phipand v. Mansfield*, Cowp. 800.

‡ *Goodright v. Cornish*, 1 Salk. 226.

taken as the word *and* ;* and it is believed that no case can be found, where after a limitation to the ancestor for life, either in possession or expectancy, the words *heirs of the body* have been so construed, as to give such heirs of the body of such ancestors an estate by purchase ; unless words of limitation were superadded by the will, or unless the words *heirs of the body* were so qualified by subsequent words, as necessarily to intend first and other sons, etc.† In this case there are no such qualifying and explanatory words, and *heirs of the body* must therefore be considered words of limitation and not of purchase.

But even upon the plaintiffs' own hypothesis, that the devise to Elisha was a fee-simple, the demandant, as to his share, could take nothing by the will ; for after the death of Elisha and the widow, the share given to Elisha vested in possession in Joseph, either in fee-simple or in fee-tail : —if in fee-simple, the estate became alienable ; —if in fee-tail, the remainder over has been defeated by the common recovery suffered by Joseph ; —since it is a rule of law, that

VII. Where an executory devise, carrying the whole or a part of the fee, becomes vested, all subsequent limitations at the same time cease to be executory, and become void or vested in interest.

For many years after the introduction of executory devises, it seems to have been holden, that an executory devise, to take place after a pending executory devise, which would carry the whole interest, was void.‡ But it was afterwards settled, that wherever the limitation of a particular estate, as for life or in tail, vests by executory devise, the subsequent limitations at the same time vest in interest, cease to be executory devises, and become mere vested remainders ; and that “ whatever number of limitations there may be after the first executory devise of the whole interest, any one of them, which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitations, which carries the whole

* *Soulle v. Gerard*, Cro. Eliz. 525. *Pain v. Mallary*, Ibid. 832. *Richardson v. Spragg*, 1 P. Will. 434. *Brownsword v. Edwards*, 2 Vez. 243.

† *Fearne* 227. *Long v. Laming*, 2 Burr 1101.

‡ *Backhouse's Case*, Pollexf. 33. *Burgis v. Burgis*, 1 Mod. 115. *Goodright v. Cornish*, 4 Mod. 255, 284.

interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest then becomes vested.”*

As to Elisha’s share, therefore, the plaintiffs have no claim to recover, either by virtue of an executory devise, or a remainder after an estate-tail in Joseph.

The Court will without doubt give a liberal construction to wills; and so far as the testators have expressed themselves clearly, or as their intentions can be gathered from the words they have used, so far the Court, if it can be done consistently with the rules of law, will effectuate those intentions. In *Dacre v. Dacre*,† though Justice Buller differed from the rest of the Court as to the meaning of words used, yet in the general principle, as above stated, the Court agreed in opinion. But it by no means results from that principle, and indeed it would be inconsistent with it, that courts of justice should give to such words a forced construction, in order to carry into effect what they may *conjecture* to be the intention: and as was said by the dissenting judge in the case above mentioned, as the question what was his intention in a particular case has not been expressly asked of the testator, unless his intention be expressed by the words he has used, it is but *conjecture* what would have been his answer. If the language of the testator be obscure, the whole will must be examined, and such a construction given to the words used, as will support the general and legal intent.‡ In the present case we contend that the testator has expressed himself not only with almost technical precision, but by words to which, when unexplained by other words, frequent decisions for more than a century past have affixed a determinate meaning; and that the general intention of the testator would be carried into effect by giving to those words the construction they would naturally and legally receive.

It is true it may be objected to the construction we contend for, that the testator could never have intended an estate, which would descend to the eldest son in exclusion of the other children: but it may be replied with equal confidence, that neither could he have designed such an estate as would be defeated in its subsequent limitations, in case Elisha had died, leaving one child, which had survived him but an hour.

* *Stephens v. Stephens*, Ca. Temp. Talb. 238. *Hopkins v. Hopkins*, Ibid. 44. *Brown-sword v. Edwards*, 2 Vez. 243. *Higgins v. Dowler*, 1 P. Will. 98. *Doe v. Fonnereau*, Doug. 487. 2 Fearn 415. 2 Will. Saund. 388 h.

† 1 Bos. & Pul. 250.

‡ *Thehusson v. Woodford*, 4 Bos. & Pul. 64.

This is not matter of conjecture, but of certainty; and the will must be construed at the moment of the testator's death.* His intention undoubtedly was to preserve the estate in the family; and after the enjoyment of it by one branch, till that was spent, to return it to the possession and enjoyment of the remaining branches.

In relation to the general policy of executory devises, it is presumed that had the distribution and liability of the estates of deceased persons been immemorially the same in England as in this country, they would never have been carried to their present extent. They have originated principally in local ideas of convenience, and have grown up in that country for the most part since the settlement of this. But they are frequently spoken of as inconvenient estates;† and are admitted with great caution, and only in cases of necessity.‡

Bliss.—The plaintiffs in error say that, upon the special verdict found upon the *venire facias de novo*, judgment ought to be rendered for them, either as devisees under the will of Ebenezer Hawley, or as heirs at law of the said Ebenezer or of Elisha Hawley.

They principally rely upon their title under the will, that thereby a proper executory devise was made to the original demandant, the devisor departing with the whole *fee-simple*, and upon the happening of a certain event limiting the estate to them. A fee-simple was given to Joseph and Elisha, determinable upon certain events which have happened.

The fundamental rule in construing wills is, that the intention of the testator must be pursued, unless that intention contradicts a plain rule of law:§ the meaning of which is, that it must not be such a limitation as the law does not allow; but not that the words must be taken precisely in that sense which the law generally gives them.|| If this is a governing rule, the original demandant was entitled: for it would be impossible for a man of plain common sense to read the will, and avoid the conclusion that the testator meant that he should have the estate, if Joseph and Elisha left no children when they died; especially in this

* *Doe v. Fonnereau*, Doug. 476.

† *Scatterwood v. Edge*, 1 Salk. 230.

‡ *Luddington v. Kime*, 1 L. Raym. 208.

§ *Loveacres v. Bright*, Cowp. 355. *Dacre v. Dacre*, 1 Bos. & Pul. 256. *Ginger v. White*, Willes 349. *Doe v. Halley*, 8 D. & E.

|| *Fearne's Ex. Dev.*, 5th Ed. 206, and *Powell's Note* thereon.

country, where estates tail are much less frequent than in England. And every lawyer, whose head was not filled with contingent and cross remainders, would be of the same opinion. The devise is a plain, correct, and even technical description of a fee-simple. It would be valid in a deed, and much more in a will, to effectuate the intent of a devisor. Is then the intention of the devisor, in the after limitations, contrary to any plain, fixed principles of law?

The after restrictions do not alter the nature of the estate first given; but declare that upon the happening of a certain event it should cease. They direct when the ulterior devise shall take effect, but do not change the precedent estate. An express estate, according with the intent of the devisor, ought not to be changed by implication.* The cases cited in the margin all show, if it needed authorities, that the first taker had a fee-simple and not a fee-tail, and that the devise over was a proper executory devise.† Had the first devise been of a plain express estate tail, perhaps the result from the authorities would have been different.‡

As executory devises cannot be barred by a common recovery, two rules have been adopted, which the plaintiffs in error are not disposed to controvert.—The first is, that if a contingent estate be limited to depend upon a freehold, which may support a remainder, it shall be construed a remainder, and not an executory devise;§ but even this rule may be set aside, when the manifest intent of the testator contradicts it.||—The second rule is that an executory devise shall be void, if it be not limited to take effect within a life or lives in being, and twenty-one years and the time allowed for gestation.¶

The devise over to Joseph, in the event which has happened, is a valid executory devise, and is not affected by the first rule. Indeed there is a small part of the property, wherein a life estate was given to the testator's widow; but there is a clear devise of a fee-simple after it, and the contingent limitations depend not on the life estate, but on the

* *Doe v. Perryn*, 3 D. & E. 490, 493.

† *Pells v. Brown*, Cro. Jac. 590. *Hambury v. Cockrill* Rol. Abr. 334. *Heath v. Heath*, Bro. Ch. Rep. 148. *Doe v. Wetton*, 2 Bos. & Pul. 324. *Gulliver v. Wicket*, 1 Willes 105. *Porter v. Bradley*, 3 D. & E. 143. *Roe v. Jeffery*, 7 D. & E. 589.

‡ *Spalding v. Spalding*, Cro. Car. 185. *Driver v. Edgar*, Cowp. 375.

§ *Purefoy v. Rogers*, 2 Saund. 388. *Doe v. Morgan*, 3 D. & E. 763.

|| *Fearne's Ex.* Dev. 206. *Doe v. Fonnereau*, Doug. 474.

¶ *Thelussou v. Woodford*, 4 Bos. & Pul. 357. 2 Wils. 213. 7 D. & E. 102. *Duke of Norfolk's Case*, 3 Cha. Ca. 11.

fee-simple: so that the rule does not apply to the case,* and the ulterior devise is limited to defeat the estate given before, and cannot be supported by it.† The limitation over is to take effect within the time prescribed by the second rule. This is the case with the devise over to Joseph, which is clearly limited to take effect at Elisha's death. *If Elisha decease leaving no heirs, etc., living Joseph.*—The phrase seems to have been adopted in conformity to the leading case of *Pells v. Brown*.‡ The cases cited all show that there can be no technical rule of law to prevent the devise being taken in its obvious sense, and limiting it, according to the intent of the devisor to the time of Elisha's death. A late case of *Doe v. Ellis*§ mentions, that Lord Thurlow had decided that *dying without issue* did not mean the same thing as *dying without leaving issue*.

There have been some cases, which have construed the same words, when applied to real and personal estate, in a different way:|| but it is contended that, after examining all the cases on the subject, the apparent intent of the devisor will govern in both. Fearne, and Powell his editor, both contend that they mean the same thing.¶ Dying without issue generally means in both an indefinite failure of issue: but may be explained by any circumstance showing the testator's intent to confine it to the time of the death. The words *heirs of the body begotten* are equivalent to *issue* or *children*, and are descriptive of the persons who are to take. If they have a different meaning, they are limited, by the phrase, "*living Joseph*," to his life. The words, *children, heirs, heirs male, heirs of the body*, may be taken as words of purchase, to carry into effect the devisor's intent.**

But if the devise over to Joseph is void, because the contingency is too remote, still the ultimate devise over to the original demandant is

* Fearne's Ex. Dev. 17, 19.

† *Gulliver v. Wicket*, 1 Wils. 105. Fearne 20. *Roe v. Jeffery*, 7 D. & E. 589. *Doe v. Walton*, 2 Bos. & Pul. 324.

‡ *Porter v. Bradley*, 3 D. & E. 143. *Roe v. Jeffery*, *ubi supra*. Dyer 127a in margin. *Goodright v. Searle*, 2 Wils. 29. *Hockley v. Mawbey*, 3 Bro. Ch. Rep. 81. *Wilkinson v. South*, 7 D. & E. 555.

§ 9 East. R. 386. *Bigge v. Bensley*, 1 Bro. Ch. Rep. 190.

|| 1 P. Wil. 664. 3 P. Wil. 259.

¶ Fearne 259, 260, 261, note a. 2 Will. Saund. 388, note k. *Tbovey v. Basset*, 10 East. R. 460.

** Willes R. 592. Doug. 264. 2 Burr 1100. *Goodtitle v. Herring*, 1 East. R. 264.

valid, and within the time prescribed by law. It is essentially the same with the cases of *Pells v. Brown*, *Porter v. Bradley*, and *Roe v. Jeffery* before cited. In the first it was *dying without issue living W.*;—in the second, *if he happen to die leaving no issue behind him*; and in the third, *if he depart this life, and leave no issue, then to B. M. & S.* or the survivor of them. These were all holden to be valid executory devises, but neither of them is so strong as the case at bar. None of them united the two circumstances of the expression *leaving no issue*, and *the living of the devisee over*, at the time the devise was to take effect. The expressions are not merely if they die *without issue*, then to my brother's and sister's children who shall then survive;—but if they decease leaving no heirs, etc., then to the children of my brother and sister who shall then survive. The word *leaving* has no technical meaning annexed to it. In its natural import it would certainly relate to the time of decease; but all possible ambiguity is done away in this case by the phrase children, etc., *who shall then survive*. The word *children* ordinarily does not mean *grandchildren*; but the words *who shall then survive* define the persons most precisely. They must have lived with the first devisees, and must have outlived them, and be alive at the time of the happening of the contingency. So that the candles were lighted, and all burning at the same time; as has been said to be necessary to make a valid executory devise.

It may be said, that upon the devise over to Joseph upon Eliska's death, his part of the estate became vested, and the subsequent limitations also became vested remainders. If this position were true, it would affect only a part of the estate; and as to the residue the judgment is wrong, and the demandant was entitled to recover it. But the plaintiffs in error contend, that the principle does not apply to any part of the estate:

1. Because the limitation over to Joseph is so remote, and in that respect plainly distinguishable from the last devise.
2. Because the devise to the original demandant was an entirely independent executory devise.

The devise to Joseph could in no sense support the after devise, and the after devise was no way dependent on the devise to Joseph. He would have no greater control over the last devise than before, unless he was tenant in tail in possession. The time when it was ascertained whether Joseph had heirs was not the time of the vesting of the first

executory devise; and therefore the principle does not apply.* The persons must then be ascertained as well as in *esse*. Where one preceding limitation vests, which carries *the whole interest*, the subsequent limitations become void;† but if the devise over to Joseph were for life only, the whole interest not being devised, the other devises remain executory; and if the devises were void, on this supposition, Joseph was only tenant for life, and his suffering a common recovery could not enlarge his estate, or bar the demandant's claim as heir at law of Ebenezer.

This case may be decided upon the principle of a contingency with a double aspect, being to take effect in one way upon one event, and in another way upon a different event; and in the event which has happened, the devise must take effect as an executory devise.‡ In addition to the cases already cited, those mentioned in the margin show that is a good executory devise to the demandant.§ So also does the case of *Fosdick v. Cornell*,|| decided in New York, where a testator gave his real and personal estate to his four sons and his daughter; and then says, if any of my sons or my daughter happen to die without heirs male of their bodies, the lands devised should return to the survivors, to be divided: this was adjudged a good executory devise of the fee to the survivors.

But admitting that the conditions annexed to the first devise of the fee to Elisha and Joseph are void, and that in consequence they took a fee-simple, the plaintiffs in error are entitled to a share in Elisha's part, according to the verdict, as heirs at law of Elisha: and if the devise over to Joseph was only for life, they will take as heirs at law of Ebenezer Hawley.

In reply to the argument for the defendants in error:—It is admitted, that words carrying a fee may, by subsequent words, be so restrained

* Fearn's Ex. Dev. 369, 370.

† Ibid. 464. *Stephens v. Stephens*, Cases Temp. Talbot 228.

‡ *Hopkins v. Hopkins*, Cases Temp. Talbot 44. *Brownsword v. Edwards*, 2 Ves. 243. *Doe v. Fonnereau*, Doug. 487. *Baldwin v. Carver*, Cowp. 309. *Statham v. Bell*, Cowp. 40. § *Hoe v. Gerrils*, Palm. 136. *Duke of Norfolk's Case*, 1 Eq. Abr. 188. Vaugh. 272. *Gardner v. Sheldon*, Bac. Abr. Uses and Trusts, G. *Miller v. Moor*, Barn. 7, 9. 1 Sid. 148. 3 Bro. Cha. Rep. 82. *Richardson and ux. v. Noyes*, 2 Mass. R. 56. *Rex v. Marquis of Stafford*, 7 East. 521, 526, 527.

|| 1 Johns. Rep. 440.

as to make it a fee-tail. But it is answered, that this never ought to be done in the case of a will, when it is contrary to the intent of the testator. And with this principle, all the adjudged cases may be reconciled. The cases cited, where there was a plain estate tail first, do not at all compare with the case at bar, and may be sound law.* In many of the cases cited for the defendants there was a clear life estate first given, which would support the remainder.† In some others the question was merely whether more than a life estate was first given:‡ so whether a devise to one and his heirs, with a limitation to a collateral heir, is not void. In some cases to effect the intent of the devisor, it may be construed an estate tail; but in others for the same purpose it may be construed an executory devise.§ Several of the cases went upon the ground, that the limitation was after an indefinite failure of issue; and where this is clearly the case, the devise over must be void.

In addition to the answer already given to the distinction insisted upon between real and personal estate, it is to be observed, that from the cases it is doubtful whether it exists in England. But in this State, where devises apparently made of both, if they are void as to one, are void as to both, and where intestate estates, both real and personal, generally descend alike, the distinction ought not to be adopted.

The defendants' counsel must be hardly pressed, to be obliged to contend that the devise over to Joseph was a good devise, and the subsequent limitation void.

If the defendants can show clearly that Joseph and Elisha took immediate estates in tail, then perhaps it might be argued, that to effect the intent of the devisor, they might take cross remainders in tail.||

But as we contend the first estate was in fee, to raise up cross remainders between them would not only be wholly unnecessary, but would plainly defeat the testator's intention. Neither can there be any foundation for altering the devises, to carry that intention into effect. There

* *Geering v. Shenton*, Cowp. 410. Vide *Ginger v. White*, Willes 348, and the doctrine laid down, 350. *Driver v. Edgar*, Cowp. 379. *Daintry v. Daintry*, 6 D. & E. 307.

† *Chadock v. Cowley*, Cro. Jac. 695. *Webb v. Herring*, Cro. Jac. 416.

‡ *Goodright v. Pullen*, 2 L. Raym. 1437. *Doe v. Holmes*, 3 Wils. 241, and *Barnard v. Reason*, there cited.

§ *Nottingham v. Jennings*, 1 L. Raym. 568. *Morgan v. Griffiths*, Cowp. 234. *Doe v. Perryn*, 3 D. & E. 484.

|| 1 Saund. 185 b, Williams's note 6. *Watson v. Foxon*, 2 East. 36.

are no general and particular intent, which are at variance. Elisha and Joseph enjoyed the estate as long as the testator designed that they should; that is during their lives only, if they left no children.

What the testator would have said, if the very *improbable* event of one of them having left a child, and that child dying in infancy, had happened, we cannot now tell. And there is no occasion to make a will for him on that account. It will be time enough to argue and decide such a case when it shall arise. It is enough for us to know that, as the case has happened, he designed to have the estate go to his other nephews and nieces, if Joseph and Elisha left no children: and every attempt to prevent this is in direct opposition to his express intentions.

Strong, in reply.—The cases cited for the plaintiffs in error are, in general, we conceive, entirely reconcilable with the positions laid down for the defendants in the opening. In some instances they go directly to support them; and in others, where at first they seem to be contradictory to the authorities we have produced, they will be found upon examination to comport with them, and to have been founded upon the principles which we press upon the consideration of the Court. Thus in attempting to show that the immediate devise to Joseph and Elisha Hawley were in fee, and the limitations over upon their failure of issue confined to the period of a life in being, the counsel for the plaintiffs points to the case of *Pells v. Brown*, the great Magna Charta, as Lord Kenyon called it, of this branch of the law: but it need not be mentioned, that with respect to the authority of that case, there can be no dispute between us; although it remains to be shown, that the leading features of that case are visible in this.

In *Hanbury v. Cockerill* the lands were devised to the survivor, in case either should die *unmarried* or *before twenty-one years without issue*: both of which events must have been determined within the compass of lives in being. In *Heath v. Heath* the devise over was, if C. should die *without son or sons, who should attain the age of twenty-one years*. The words *son or sons* evidently intended first and other sons, the immediate descendants of the father, and upon their attaining the age of twenty-one years the devise over is defeated. *Doe v. Wetton* is precisely within the principle, and nearly in the words of *Pells v. Brown*. In *Gulliver v. Wicket* the child of K. must have attained the age of twenty-one or not. If he did, the devise over was defeated; if he did not, and

left issue, it was also defeated. If in that case he left no issue, the devise over would vest seasonably, and so was good. In *Porter v. Bradley* the words were these, "if my said son should happen to die, *leaving no issue behind him*;" and the Court held that the dying without issue was restricted to a life in being. And the words *behind him* perhaps would naturally enough intend this restriction. But the suggestion of Lord Kenyon, that the distinction taken in *Forth v. Chapman* was not founded in reason, was a mere *obiter dictum* without influence in that or any subsequent case. The correctness of that distinction, however originating or founded, was afterwards recognized by Justice Buller in *Comberbach v. Perrin*,* and by Lord Kenyon himself in *Daintry v. Daintry*. In *Roe v. Jefferey*, Lord Kenyon said he had given no judicial opinion in *Porter v. Bradley*, respecting the distinction taken in *Forth v. Chapman*: and Justice Lawrence, in *Everett v. Cook*,† declared that Lord Kenyon had never denied that distinction to be law. Fearn,‡ after remarking, in relation to the case of *Porter v. Bradley*, that there is great reason to believe that the words *behind him* were much relied upon in the decision, says, "it is impossible to reconcile one's self to a supposition, that the Court would, without such a ground of distinction, have dismissed all attention to the antecedent decisions upon the point." And Powell§ observes with considerable warmth, that "if we now decide that the words *leaving no issue*, as applied to real property, are not to be received in a different sense from those words, as applied to personal property, namely, as implying a general failure of issue, we shake every title, in which that circumstance has occurred, from the period in which *Forth v. Chapman* was determined, down to that in which the case of *Porter v. Bradley* occurred," a period of nearly eighty years. It is not easy therefore to conceive, that the extrajudicial remark of Lord Kenyon, which his cooler judgment must have censured as unguarded and useless, will be suffered in any degree to influence the Court.

In *Roe v. Jefferey*, the principal ground of decision seems to have been, that the limitations over were to persons in *esse* and of life estates. Neither of those circumstances is discerned to be in this case: certainly not the first.

But it is said, there is really little matter of dispute between us; since according to Lord Ellenborough in *Doe v. Ellis*, Lord Thurlow

* 3 D. & E. 494.

† 7 D. & E. 271.

‡ Page 211.

§ Page 258.

declared in *Bigge v. Bensley*, that there were not less than fifty-seven cases upon this point, and that to call *dying without leaving issue* the natural sense of *dying without issue* was against all the cases!—But how is this declaration to be understood, and for what purpose was it referred to by Lord Ellenborough? The counsel for the plaintiffs in error would have it understood that Lord Thurlow was speaking generally, as well of limitations of freehold estates as chattel interests. But his observations were confined to devises of personal property. In *Forth v. Chapman* it had been decided that *dying without leaving issue* intended, in the case of a term, a dying without issue at the time of the death; and it was subsequently holden, that the words *dying without issue* intended a like restriction. But his lordship censures this doctrine, and says that to say, in cases of personal property, a *dying without leaving issue*, is the natural sense of *dying without issue*, is against all the cases. Lord Ellenborough then, in a case of freehold estate, when the general words, *dying without issue*, were used by the testator, might with much propriety, after stating that these words intended an indefinite failure of issue, refer to this declaration of Lord Thurlow, as proving that even in the case of personal estate they would receive that construction.

The same observations may be made as to the opinions of Fearne and Saunders, referred to by the counsel for the plaintiffs. So far from insisting that the words *without leaving issue* or *leaving no issue*, in the case of freehold, denote a failure of issue without the period of a life in being, they merely contend, that the words *without issue*, in the case of a term, should *ex vi termini*, unless other words are introduced to vary the construction, be considered as intending an indefinite failure of issue.

The case of *Wilkinson v. South* turned upon the words *dying without issue*, it being the devise of a term.

As to the case of *Fosdick v. Cornell*, cited from the New York reports, it may be at once answered, that if the case were decided *entirely* upon common law principles, and the decision were not founded on the nature of the estate limited over, and the persons in whom it was to vest, it is not, in our apprehension, notwithstanding the present distinguished character of the Courts of that State, supported by a single authority in the English books.

The only remaining case now recollected, which seems to have any

bearing upon the present question is, that of *Richardson and ux v. Noyes*. Whether that case was or was not correctly decided, it is sufficient for our purpose, that two principal grounds for the opinion of the Court were, that the testator could not have intended an estate, which would descend to the eldest son, in exclusion of the other children;—and that the real and personal estate being limited over upon the same contingency, the nature of the personal estate devised denoted the obvious intention of the testator to confine that contingency to a life in being.—Now as to the first circumstance, if it were to be taken as a distinct ground of decision, the argument would prove too much; since any estate tail, arising by implication however strong, or even created by express terms, would be liable to the same objection:—and the second ground renders that case obviously distinguishable from this.

We see no reason therefore to doubt the correctness of the positions we before laid down, as to the effect of words denoting a failure of issue.

But it is said, that in this will there are words which, if unrestrained, would carry a fee: and that where a fee is created by positive words, it can be defeated only by subsequent words, equally plain, or by necessary implication. This however is saying nothing, as we have all along contended, that the cases cited have decided an estate tail to be necessarily implied, when a man devises an estate to one and his heirs, and limits it over to a third person upon the second dying without issue. But separate from the words, “*leaving no heirs of his body*,” the extent of the devise itself is in this case *restricted and limited* expressly.

Again, it is urged, that by the expression, “*to such of my brother’s and sister’s children as shall then survive*,” the dying without issue is confined to the time of the death; since the word *survive* must intend that the person, who is to take, should be living with the testator, and outlive the rest of the children. But this is clearly incorrect. To *survive* means simply to remain in life after the death of another; and without a solecism, a man, who had no children, might well enough devise to such of his descendants as should survive at the termination of the present century.

The counsel for the plaintiffs has suggested, that these are exceptions to the propositions, stated in *Purefoy v. Rogers*, relative to limitations vesting as remainders in all possible cases. The true rule may be, that when, upon a fair construction of the will, it appears to be the intent

of the testator to limit an estate over, upon any contingency, after a precedent freehold capable of supporting a remainder, such limitation over shall operate by way of remainder, and not as an executory devise. But Fearne, in saying that the rule, as stated in *Purefoy v. Rogers*, may be overruled, means only to say that the rule is not to be applied until the intent be discovered: not that an executory devise may in any case take effect as such, where there is a freehold capable of supporting the devise as a remainder. Such a species of executory devises would be altogether anomalous.

In relation to the objections urged against the limitations over being defeated upon the vesting of Elisha's share in Joseph, we see no reason to vary the position we have before taken. It was once holden, that any limitation, after an executory devise of *the whole interest* was absolutely void: but it was afterwards ruled, that until such executory devise vested, the subsequent limitation was good. In the event of the first failing, the second would take effect. But when the first limitation vests, the old principle becomes applicable; and it is believed that no case can be found, in which it is decided, that the last limitation continues to exist after the first, which carries a fee, has vested. It is perfectly immaterial whether the second be remote or independent. Such is the established rule in all cases; and there is not, we believe, a single *dictum* against it.

The intention of the testator, if it be consistent with the rules of law, will without doubt be carried into effect. But whether certain words shall in all cases receive the same construction, when no other words are introduced to vary that construction, there can equally be no question. Were it otherwise, instead of the hardships which would result, as Lord Mansfield said, to the profession, if the law were so *certain* that everybody knew it, the whole community might be incommoded by its being so *uncertain*, that nobody could know it.

The principal questions, presented to the consideration of the Court in this case, have been once solemnly determined after repeated arguments, by the highest judicial tribunal in the commonwealth: and we have reason to believe that the present Court will not, without substantial reasons, declare the unanimous opinion of their predecessors erroneous. It is of the utmost importance that titles, which have been once adjudged good, should not unnecessarily be again brought into dispute: and if they are, that known and long-established principles of law

should be adhered to with strictness in the investigation. Lord Parker observed in the case of *Goodright v. Wright*,* that altering the settled rules concerning property was the most dangerous way of removing landmarks; and Fearn, in his comment on the celebrated case of *Perrin v. Blake*, after remarking the uncertainty which would attend all titles, until formally examined by a court of justice, in case the rules of law were to ebb and flow with the taste of the judge, and the fashion of the times, thus proceeds: "Nay, even a decision of a court of justice upon the very identical title, would be nothing more than a precarious temporary security; the principles, upon which it was founded, might, in the course of a few years become *antiquated*; the same title might be again brought into dispute; the taste and fashion of the times might be improved; and on that ground a future judge might hold himself at liberty, (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions of those who went before him."

The judges having conferred together on this cause during the vacation, the Chief Justice drew up the result; and being detained from attending at this term by bodily indisposition, transmitted that result to his brethren here, which was now pronounced by PARKER, J. as follows: the parties expressing a strong desire for the decision of the cause, and SEDGWICK, J. sitting *pro forma*, having been of counsel in the original action.

The plaintiffs, as the children and heirs of Moses Hawley, have sued this writ, to reverse a judgment rendered against their ancestor at the term of this Court holden in this county in May, 1792. The judgment was rendered upon a writ of *entry sur disseizin*, and by the said Moses, in which he counted upon his own seizin in fee, and on a disseizin committed by the defendants in their corporate capacity. The writ demanded eight several parcels of land, and one-third part in common of five other parcels of land, formerly the estate of Ebenezer Hawley deceased. On a trial upon the general issue, the jury found a special verdict, on which judgment was rendered for the defendants.

On inspecting the record, it appeared to the Court that the defendants

* 1 P. Will. 399.

derived their title under a devise from Joseph Hawley, who, as they argued, had been seized in fee-tail, and had suffered a common recovery to his own use in fee: but the verdict did not find that the recovery had been executed. On mentioning this defect, the defendant's counsel produced a record of the execution of the recovery; and thereupon the Court recommended to the parties to adopt some method, by which the execution might appear on record, as a fact found.

This recommendation was made on the authority of the case of *Witham v. Lewis*.* In this case it was holden by the highest judicial authority, that no uses were raised by the suffering of a common recovery, unless the same was executed: and that the uses arose from the execution.

The parties therefore, desirous to have the cause decided on its merits, agreed that the judgment should be reversed, and that a *venire facias de novo* should be ordered. On a new trial, pursuant to such order, the jury have again found a special verdict; and what judgment is to be rendered on that verdict, is the great question before the Court.

The verdict substantially finds, that Ebenezer Hawley, on the 29th of July, 1751, was seized in fee-simple of the tenements demanded; that he then made his will, and afterwards on the 18th of August, 1751, died so seized; that by his will he devised some portion of the tenements to his wife Bethiah for life; that he devised the residue, including the remainder expectant on his wife's death, to his nephews Elisha Hawley and Joseph Hawley, but severally and in distinct parts, to have and to hold the parts devised to *Elisha, to him, his heirs and assigns forever, on the conditions and limitations after in his will mentioned*; and to have and to hold the parts devised to *Joseph, to him, his heirs and assigns forever, on the conditions and contingencies after mentioned in his will*. The testator then proceeds, "And it is my will and pleasure, and I have made the foregoing devises and bequests with the provision and limitation, that if it should so happen that the said Joseph should decease, *leaving no heirs of his body lawfully begotten, and the said Elisha, or any heirs by him the said Elisha lawfully begotten then alive, that in such case all the devises and bequests of real estate herein before made to the said Joseph should be and remain to him the said Elisha or such his said heirs*. And in case the said Elisha should decease *leav-*

* 1 Wils. 48. 2 Strange 1185, S. C. 4 Bro. P. C. 504, S. C.

ing no heirs of his body begotten, living the said Joseph *or any heirs of his body lawfully begotten*, in such case all the lands herein before devised to the said Elisha shall be and remain to the said Joseph or such his said heirs.—But in case both the said Joseph and Elisha should decease leaving no heirs of either of their bodies begotten, then all the lands herein before given to the said Joseph and Elisha, or either of them, *shall be and remain to the children of my brethren and sister who shall then survive.*”

The verdict further finds, that on the death of the testator Ebenezer, his widow and his nephews Elisha and Joseph respectively entered into and became seized, as the law requires, of the several estates devised to them ;—that afterwards, on the 24th of September, 1755, the said Elisha died seized, without leaving any heirs of his body, the said Bethiah and Joseph being then alive ;—that on his death the said Joseph entered into the estate that had been so devised to the said Elisha, and became seized thereof as the law requires ;—that afterwards, on the 2d of March, 1781, Bethiah the widow died, and the said Joseph thereupon entered into and was seized of the estate devised to her for life, as the law requires ;—that afterwards, on the 10th of March, 1788, the said Joseph died without any heirs of his body, leaving nine cousins, the children of the brethren and sister of the testator, of whom Moses Hawley, the father of the plaintiffs in error, was one, who on the said Joseph's death were his heirs at law, and also the heirs at law of the said Ebenezer, the testator.

The verdict further finds, that the said Joseph, at a Court of Common Pleas holden for this county in August, 1783, being then seized of the tenements aforesaid, and claiming to hold them as an estate tail, suffered a common recovery thereof in due form of law to his own use in fee-simple, which recovery was duly executed ;—that afterwards in September of the same year the said Joseph, then seized of the tenements, as the law requires, made his will, executed in due form of law, which since his death has been duly proved, and therein, after reciting his former estate tail and the common recovery suffered and executed, devised the tenements aforesaid to the inhabitants of Northampton, who are the defendants in error, in fee-simple, and afterwards died so seized as aforesaid ;—that on the death of the said Joseph, the defendants in error entered into the tenements aforesaid, and were seized as the law requires ; on whom Moses Hawley, the original demandant, entered ; and there-

upon the defendants re-entered on him, and he thereupon sued his writ of entry.

The verdict further finds, that if the said Moses had right to recover any part of the tenements, as a devisee under the will of the said Ebenezer, then the defendants disseized him of one undivided ninth part; but if the said Moses had right to recover any part as an heir at law of the said Ebenezer, then the defendants disseized him of one undivided eighth part; otherwise that the defendants did not disseize him.

The plaintiffs' claim is under an executory devise, to take effect on the dying of Elisha and Joseph without issue living at their decease, they having estates in fee-simple limited on this contingency, which in fact has happened. Or, they claim in right of their father Moses, who was a coheir of Ebenezer, the original testator.

The defendants claim under the will of Joseph, on the ground that the plaintiffs' right was a remainder expectant on the determination of an estate tail in Joseph, which he barred by the common recovery.—The decision of these respective claims must depend upon the construction of Ebenezer Hawley's will.

In construing a will the testator's manifest intention, to be collected from the whole will, and not from any detached passages, must prevail, so far as such intention is consistent with the rules of law. And when the particular intent cannot be executed, the general intent must direct the construction. As it is the interest of the commonwealth that lands should be transferable, and not remain in any man or family unalienable, so it is one of the rules of law, which limit the power of devising, that perpetuities be not created. Therefore in a devise in fee-simple, on condition that the devisee do not alien, the condition is void. Also in a devise of lands in tail, on condition that the devisee do not bar the entail, the condition is void. And in a devise to one and his heirs, remainder to another and his heirs, which is termed the limiting of a fee-simple after a fee-simple, the remainder is void, because it would defeat the right of alienation in the first devisee.

But the law will allow a devise of lands in fee-simple to one, with an *executory devise* over to another on a contingency, which must happen within the compass of a life or lives in being, and twenty-one years and a few months after. The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child. But if the devise over is limited after the de-

visé of a part, and not of the whole of the fee-simple, the second devisee shall take by remainder, either vested or contingent, and not by executory devise.

As remainders are estates at common law, while executory devises can only be created by will, and are admitted from necessity, to execute the legal intent of the testator, it is an essential principle of law, in the construction of wills, to exclude executory devises, when the estate can pass as a remainder.

It is another important rule in the construction of wills, to give to specific words of the testator that technical effect, which has been derived from usage, and sanctioned by a series of decisions. Thus in a devise to one and his heirs, we cannot consider the heirs as deriving any interest from the devise, although the testator might have contemplated such interest; but we are bound to consider the word *heirs* merely as limiting a fee-simple in the devisee. In a devise to a man and to the heirs of his body, these last words are a limitation of an estate tail; and if it descend from the devisee in tail, all the heirs of his body cannot take together, but only in succession, the eldest son and his issue, then the second son and his issue, and so on. But if lands are devised to one, without any limitation, he has only an estate for life; although undoubtedly the testator, when he devises a farm or an house to one, supposes that he has given a fee-simple.

And there are cases where the same words shall have different constructions, according to the nature of the property to which they are applied, for the purpose of supporting the manifest general intent of the testator, when the particular intent is against law. When lands and a chattel interest are devised to one, and if he die without *leaving issue*, then a devise over; the devisee has an estate tail in the land, the words *leaving no issue* being as to the land understood as an indefinite failure of issue; but as to the chattel interest they are construed as leaving no issue at the death of the devisee. Now the testator had the same particular intention in devising the land and the chattel interest; but to support his general intention, the same words have a different technical construction.* In the devise of the land, the words *dying without issue* being understood as an indefinite failure of issue, gave the devisee an estate tail, provided for his issue, and the second devisee could take a

* 1 P. Will. 667. *Forth v. Chapman*, 3 Atk. 288. *Sheffield v. Lord Orrery*, 2 Vez. 606. *Southby v. Stonehouse*, Cowp. 410. *Geering v. Hinton*.

remainder; so that it became unnecessary to introduce an executory devise: but as to the chattel interest, if an indefinite failure of issue was admitted, the first devisee would have the absolute property of the chattel, and the testator's general intention in favor of the second devisee would be defeated. And with respect to the land, if dying without leaving issue is to be intended as without having issue at his death, the first devisee would have an absolute estate in fee-simple on having issue: yet he might aliene it from his issue, and the second devisee would have no benefit from the devise.

This technical effect to be given to specific words is required only in similar cases: for in a case where other words of the testator, or some particular circumstances, serve to give a different explanation to such specific words, a different construction ought to be admitted, so far as may be consistent with the rules of law.

The importance of adhering to a course of decisions in the construction of wills is manifest; for their authority has established a rule of property, on which many estates depend: and to overturn them would introduce perplexing uncertainty, and might shake many titles resting on the faith of them. To this reason another may be added: that the rules of property should be so certain, that generally men may know their titles without having recourse to expensive lawsuits. And when gentlemen learned in the law are consulted, they should have some guides to direct them in their advice.

To decide without subjection to fixed principles may be called discretion, but in fact it is power. The common law consists of maxims and principles resulting from the practical wisdom of ages; and we know of no other discretion it gives to a judge, in deciding a novel question of property, than to apply those maxims and principles, by a sound analogy, to the new case. It is for the legislature to introduce new rules of decision.

With these general rules before us, we will look into the will; and as Joseph survived his brother Elisha, we will notice particularly the devise to Elisha, comparing it with the other parts of the will.

The devise to Elisha is to him, his heirs and assigns. This is an express devise of a fee-simple to him: and as the devise to Joseph is in the same terms, the plaintiffs can have no claim under the will of Ebenezer, if these devises were absolute. But he makes them upon the conditions, limitations, and contingencies after mentioned. These expressions it would be unreasonably rigid to construe technically; for a

condition may, when necessary, operate as a limitation, a limitation may be on condition, and both may be contingent. This condition, limitation, or contingency is thus expressed.—*In case Elisha should die leaving no heirs of his body, living the said Joseph, or any heirs of his body lawfully begotten, all the lands devised to Elisha shall be and remain to Joseph or such his said heirs.* A similar provision as to the lands devised to *Joseph*, in favor of *Elisha* or the heirs of his body.—*But if Joseph and Elisha should die, leaving no heirs of either of their bodies, then all the estate shall remain to his cousins, who shall then survive.*

The effect of these provisions, as the plaintiffs contend, is that estates in fee-simple were devised to the two nephews of Elisha and Joseph, and at the decease of both, without leaving any issue at their deaths, the estates passed by executory devises to the cousins then living.

But the defendants have argued that by these devises the two nephews were tenants in tail, with cross remainders in tail, and a contingent remainder to the cousins then living.

No decision of a similar devise has been found; and we must give such a construction as will best effect the general intention of the testator, without violating any established rules. We consider the words *dying without leaving heirs of his body* as equivalent to *dying without leaving issue*. Now it seems to be settled, that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, creates an estate tail in the first devisee, with a remainder over, when the limitation over can take effect as a remainder, unless there are other words to control this construction.*

This rule is founded on the reasonable consideration, that the testator included the issue of the first devisee as objects of his bounty; and this bounty cannot be well effected but by vesting an estate tail in the first devisee; in which case the issue on his death will take in succession, and when the issue shall fail, the remainder will take effect in possession. But if by such devise the first devisee shall take a fee-simple conditional, although on his death not then having issue, the second devisee might take by executory devise; yet if the first devisee left issue, not only the claim of the second devisee would be defeated, but the issue could derive no benefit from the testator's bounty, as their ancestor might alienate the estate at his pleasure.

* Com. Rep. 373. *Walter v. Drew*, Hardw. 258. *Wealthy v. Bosville*, Doug. 729. *Winkle v. Billington*, 2 Saund. 380. *Purefoy v. Rogers*.

We have observed that this construction is sometimes controlled by other parts of the will. On this head two cases have been decided. The case of *Porter v. Bradley*, cited at the bar, was an express devise in fee-simple to one, and if he died without leaving issue *behind him*, then to another: and it was holden that the words "behind him" confined the dying without issue to the death of the first devisee; and consequently that the first devise was a contingent fee-simple, and the devise over executory.—The other is the case of *Sheers et al. v. Jeffery*, also cited at the bar, where after an express devise of a fee-simple to one, and on his dying without having issue, to another for life, it was holden that the testator intended the dying of the first devisee without issue at his death; because it could not be supposed that the testator would give a life estate to a person *in esse*, after the indefinite failure of the issue of the first devisee. This case is the stronger, because the life estate was not given by express words, but resulted from construction, as there was no limitation of the estate given to the second devisee. Whether the presumption was necessary may well be questioned, as the age or infirmity of the first devisee might not give the testator any expectation that he would ever have issue.

Agreeably to this case, if the devise before us was to the nephews in fee-simple, and if they died without leaving issue, then to the cousins for life, the first devise would have been a contingent fee, and the second executory. But if the devise to the cousins was of a life estate, it would not avail the claim of the plaintiffs under the will in this action, because their ancestor counted upon a seizin in fee-simple, which this construction would not support.

But admitting that a fee-simple was devised to the cousins, yet we are satisfied that, on a principle analogous to this last case, the original devise to the nephews of an express fee-simple would have been reduced to a conditional fee, if the devise over had been if they died without leaving issue, and no provision had been made for the issue of the nephews.—For the devise over is to such of his cousins as should then be living. And the presumption, that the testator did not intend a life estate to a person *in esse*, after the indefinite failure of the issue of the first devisee, is not stronger than a presumption, that he did not intend a contingent estate to such of his cousins as should be living after the indefinite failure of the issue of both his nephews.

And if the testator had not considered the issue of his nephews as an

object of his bounty, but leaving them to the discretion of their fathers, had confined it to his nephews and to his cousins, we apprehend, the whole intention of the testator might well and legally be executed by a contingent fee-simple to the nephews, and a devise over to the cousins living at the death of both the nephews, without having at their decease issues of their bodies. But if the issue of the nephews are provided for, then a different construction must prevail.*

But were not the issue of his nephews intended by the testator to have some benefit from his devise to their parents? Now he has provided that on Elisha's death without leaving issue, living Joseph or his issue, Joseph or his issue shall take the lands devised to Elisha; and a similar provision for Elisha's issue in the lands devised to Joseph on his death without leaving issue, living Elisha or his issue. The testator has therefore expressly provided for the issue of his nephews in the lands respectively devised to their uncles. But as he clearly intended that the issue of each nephew should have the lands devised to his uncle on his dying without leaving issue, it must be inferred that he intended such issue should have the lands devised to his father leaving issue at his death; or we must absurdly suppose that the testator has protected the issue of each nephew against the alienation of their uncle, and at the same time left them to be disinherited by their father.

The conclusion from this reasoning is, that the testator intended to prefer the issue of the nephews to his cousins, and that the estate given to each nephew respectively should go to his issue, if he left any. This being his clear general intention, the will must receive a construction which will execute it. But the rights of the issue cannot be secured, without vesting an estate tail in their fathers. For we know of no rule of construction, by which a devise to one in fee, on the contingency of his leaving heirs of his body, can be holden to be a contingent fee to the first devisee, and an executory devise to his issue. The devise of a contingent fee-simple in the first devisee, and then over to the heirs of his body, being by the same instrument, must, by analogy to the ancient rule in *Shelley's Case*, be considered as vesting an estate tail in the first devisee: and the issue cannot take as purchasers.

Upon the plaintiffs' construction, the will is to be considered as devising first an estate in fee-simple in the first devisee, then on his death

* 9 East. 382. *Ellis v. Ellis*.

to the heirs of his body, if he have any,—if not, then over to the cousins, which construction, it is said, is authorized by the case of *Fonnereau v. Fonnereau*.

But this construction is not supported by that case. There the eldest son having a life estate, and his father, the testator, being seized only of a reversion, devised the estate to the heirs male of the first son, remainder to the other sons in tail in succession.—And it was holden, that as the first son took nothing by the will, his heirs male would take by executory devise, for *nemo est hæres viventis*, and consequently the devise to the second son was executory: that on the death of the first son leaving heirs male, they would take the estate in succession, and the devise over to the second son would then have been a remainder. And as the first son left no issue male, the second should take by executory devise.—This case may be simplified by supposing the devise to be of a reversion to be to the heirs male of J. S. then living, remainder in tail to A. Now as J. S. was living, as well the devise to his heirs male as that to A. are both executory; and if the heirs male of J. S. ever take the estate in possession, then the interest of A. is a remainder.

But in the case at bar, it must be considered as a devise to J. S. and to his heirs, with remainder to the heirs of his body; in which case very clearly J. S. would take an estate tail, and the heirs of his body, if he left any, would take by descent, and A. would take a remainder.

The only construction, therefore, which will execute the manifest general intent of the testator, so as to include all the objects of his bounty, is by a devise to his nephews in tail, with cross remainders in tail, and a contingent remainder to his cousins living when these estates tail should be spent. Upon this construction the nephews first take, then their issue in succession, then the survivor and his issue, and lastly the cousins.

But it is incident to an estate tail to be barred by suffering and executing a common recovery, by which the rights of the issue, and of all in remainder or reversion are extinguished. This is also the effect of a common recovery with single voucher, suffered by tenant-in-tail actually seized of the estate entailed.

We are therefore satisfied that Joseph Hawley, when he suffered the recovery, was seized of an estate tail, which was barred by the execution of the recovery, and an use in fee-simple raised to himself;—and that the estate lawfully passed by his will to the defendants to hold in fee-simple.

Neither Moses Hawley, the original demandant, nor the plaintiffs in error, his heirs, have now any claim to the tenements demanded, under the will of Ebenezer Hawley. And there does not seem to have been any color of title in Moses Hawley, as an heir at law of Ebenezer the testator, who certainly by his will devised all his interest in the lands, leaving no reversion in himself, unless the two nephews took estates in tail. And if they did, and the entails are legally barred, then that reversion is extinguished. And as we are of opinion that the two nephews took cross remainders in tail, Joseph, the survivor in possession, lawfully barred the reversion. The defendants in error must therefore have judgment.

Mr. Butler thus defines cross-remainders: "When lands are given in undivided shares to two or more so as that upon the determination of the particular estates in any of those shares they remain over to the other grantees, and the reversioner or remainderman is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them, on the failure of the particular estates, are known by the appellation of cross-remainders." Butler's note, Co. Litt. 195 a. This definition is adopted by Mr. Tudor in his note to *Gardner v. Sheldon*, Tudor's Lead. Cas. in Real Prop., at page 656.

The definition, however, seems to be somewhat unnecessarily restricted, for there is nothing either in the reason of the thing or in authority which will prevent separate lots of land being so limited that there will be cross-remainders between the owners thereof, as in the case put by Kent of a devise of one lot of land to A. and of another lot to B., with a provision that if either die without issue the survivor shall take, and if both die without issue then to C. in fee, 4 Kent's Com. 201; or as in the case put by Blackstone of a devise to A. of blackacre and to B. of whiteacre in tail, and if they both die without issue then to C. in fee, 2 Blackst. Com. 381; and see *Harbison v. Swan*, 58 Mo. 147.

The following is suggested as a more accurate definition. Cross-remainders exist when lands or tenements are so limited by deed or will that two or more persons take either undivided shares as tenants in common or separate parcels of land in severalty, and the limitation of each share or parcel is such that upon the determination of the estate therein of the particular tenant, the share or parcel held by him will remain over to the other

grantees or devisees in such manner that the ulterior remainderman or reversioner will take nothing until the estates of all the original grantees or devisees have been determined.

Creation of Cross-Remainders. If Created by Deed must be by Express Limitation.

Cross-remainders may be created either by deed or will, but where they arise from a deed they must be created by express limitation, for in a deed they cannot have an origin through implication; this was established by the case of *Cole v. Livingston*, 1 Vent. 224, and is regarded as an inflexible rule; in *Doe d. Tanner v. Dorvell*, 5 D. & E. 521, Lord KENYON said that to question it would be to remove the landmarks of real property; and see *Bohon v. Bohon*, 78 Ky. 408.

By Will, Cross-Remainders may be Created either Expressly or by Implication.

In a will, however, cross-remainders may arise either by express creation or from implication. Examples of express creation may be found in the following cases—a devise by the testator to his sister Mary and his two nephews, Wall and Farrell, with the provision that “at the death of either their part shall devolve to the survivor or survivors, provided the said Wall and Farrell have no heirs, and should the said Mary survive them she shall have full liberty to will or dispose of it as she may think proper,” etc., *Wall v. Maguire*, 24 Pa. St. 248; a devise to eight children of the testator, provided that if any die without issue his share shall be divided amongst the surviving brothers and sisters, *Hall v. Priest*, 6 Gray 18; a devise of an estate to each of three grandsons, “to him during his natural life and then to his children forever; but if either of my grandchildren should die without leaving a child or children capable of inheriting, the share of my property I have given to him as above recited . . . shall go and be divided between the survivors, or if two should die without leaving a child . . . , then to the survivor for life and then to his children forever,” *Williams v. Kibler*, 10 So. Car. 414; a devise to H. of the northern half of a certain plot and to J. of the southern half of the same, and in case of the death of either without issue the part devised to descend to the survivor, *Harbison v. Swan*, 58 Mo. 147; a devise to the five daughters of the testator, “to them and their heirs forever, to be equally divided amongst them; and it is my will that if either of the said children die without issue lawfully begotten of their body, in that case the part of the said child be equally divided among my surviving daughters,” *Hoxton v. Archer*, 3 G. & J. 199.

Cross-Remainders by Implication formerly not Favored. Now their Creation a Question of Intent as in other Cases of Interpretation of Wills.

With regard to cross-remainders by implication, dicta are to be found in the reports and proceeding from eminent authority which would seem to indicate that they will not be raised by construction where that result can be avoided; thus TILGHMAN, C. J., in *Simpson v. Coon*, 4 S. & R. 368, said: "Cross-remainders are not favored at law, nor are they implied but from necessity;" and in *Hungerford v. Anderson*, 4 Day 368, REEVE, J., said: "It is a universal rule of law that cross-remainders can never be created but by express words in the will or by necessary implication." But notwithstanding dicta which seem to imply reluctance to uphold cross-remainders by implication, the law undoubtedly is that the creation or non-creation of cross-remainders is a question to be settled, like all others arising upon the interpretation of a will, by the ascertainment, as nearly as possible, of the testator's intent; as said by DUNCAN, J., in *Simpson v. Coon*, after discussing the doctrine of cross-remainders; "but all this doctrine is now settled on principles of common sense; it is matter of intent to be collected from the whole will." And this view is well demonstrated in *Seabrook v. Mikell*, Cheeves Eq. 80, by HARPER, Ch., whose opinion was adopted by the appellate Court, "In the elder cases, which are generally collected by Sergeant Williams in his note to 1 Saunders 185 a, n. 6, it is said that the leaning of the courts is against the raising of cross-remainders; that they will not be implied if, in the case of estates tail, the limitation is to the issue of the devisees, respectively, and for want of such issue over, and that there shall not be such implication between more than two. But the more modern decisions, which may be regarded as the settled law, are that the Court leans in favor of cross-remainders in order to effectuate the intention. . . . In *Gorges v. Webb*, it is said by MANSFIELD, C. J., 'It has been truly said that the ancient doctrine upon this subject has been broken in upon, but it is wonderful how it ever came to be established.'"

Presumption from Number of Devisees.

Part of the old doctrine arising from the disfavor with which cross-remainders were regarded, was the position that cross-remainders by implication would not be allowed between more than two devisees, and this is stated as law by Blackstone, Com., Lib. 2, p. 381, but has been long since exploded, and the rule as laid down by Lord MANSFIELD, in *Pery v. White*, Cowp. 777, is that where cross-remainders are to be raised between two, the presumption is in support of cross-remainders; where they are to

be raised amongst more than two, the presumption is against them; but in either case the testator's intention will rule.

Test of Intention said to be Found in Devise Over.

The test of the testator's intention, it is held, is to be found in the provision for the devise over; if it appears to be the intent that the devisee over shall not take anything until all the preceding estates have expired, then there will be cross-remainders between or amongst the preceding devisees; but where it appears to be the intent to sever the devolution of the preceding estates, so that on the expiration of each one thereof there is a limitation in remainder to a third person, although that person be the ultimate remainderman in the case of each estate, there will be no implication of cross-remainders; see *Hungerford v. Anderson*, 4 Day 368. In this case REEVE, J., said: "In order to constitute a cross-remainder by necessary implication, there must appear in the will an intention that no person shall inherit any part of the estate, or take it by way of remainder as long as any of the devisees or any of their issue to whom it was given are alive. Every case to be found arises where an ultimate remainder was limited after failure of the devises to the same person, and the inquiry has ever been, can this person to whom the remainder was limited take the estate of one of the devisees dying without issue, or must he wait until all the devisees are dead without issue? The intent as manifested in the will determines this."

The implication that the ultimate remainderman must wait until the exhaustion of all the previous estates, has been held to arise where the devise was to two sons of the testator for life with remainder to their issue; "and in case my surviving son shall depart this life" without issue, remainder over; for the context the "surviving son" could mean only the son who should have taken the whole estate, *Seabrook v. Mikell*, Cheeves Eq. 80; and such implication has been even held to arise in a case where the devise was of land to two persons during their respective lives, and after their deaths to be sold and the proceeds invested, *Purdy v. Haight*, 92 N. Y. 446.

But even where there is a provision that the ultimate remainderman shall not come into possession until after the death of both or all the particular life tenants, the intention may be so manifested that cross-remainders will not be implied between or among the first takers, thus in *Cheney v. Teese*, 108 Ill. 475, the testator made a devise in fee "to my grandchildren, whatever number they may be, born of my two daughters, share and share alike, to take possession only after the death of my said daughters, . . . who (my said daughters) shall have full use and possession of

all said lands . . . during their natural life." The Court held that the daughters were tenants in common, each holding her undivided share for her own life and the life of her sister should the latter survive her, and hence that on the death of one of the daughters her share passed to her devisees, until on the death of the surviving daughter the remaindermen became entitled to all the land devised.

Implication from a Devise to Several with Devise over to Third Person on their Death without Issue.

A common case of implied cross-remainders is where an estate is given to certain persons either by name or designation, as constituting a class or otherwise, and on their death without issue then over to a third person. Here both reason and authority demand that on the death of any one without issue before the death of the other or others holding estates in *con-simili casu*, the estate should go to that other or those others until the event, upon which the limitation over is to take effect, occurs.

Thus in *Pierce v. Hakes*, 23 Pa. St. 231, there was a devise to H. for life, and after her death to M. and A. and to their issue, equally to be divided, "and if both should die and not leave any issue from their bodies begotten, then to X.," it was held that M. and A. took cross-remainders in tail by implication. In *Simpson v. Coon*, 4 S. & R. 368, a will created a trust, one equal half for Eleanor Hunt and the other half for John Ledlie, "the survivor of either to possess the whole of said estate either by will or otherwise." A codicil added, "in case of no legitimate heirs of the bodies of the two legatees or ere one of them, that after his or her decease it should revert to the heirs of my sister." Cross-remainders were held to be implied between John and Eleanor.

Words of Survivorship sometimes Implied.

While words of survivorship have been by some considered necessary for the implication of cross-remainders, yet they may be implied where, from the context of a will, it is evident that the testator intended to create cross-remainders; thus in a very recent case, *Allen's Estate*, 14 W. N. C. 439, there was a devise by the testatrix of one-third of her residuary estate to her husband for life, with remainder to her stepchildren, Roland and Ellen Allen, and in case of the decease of both of said stepchildren without leaving issue surviving them, to the testatrix's daughter Mary. Roland died without issue during the life of the husband. After his death, Ellen

claimed the remainder of the entire one-third; this claim was disputed by the counsel for Mary, who denied that cross-remainders had been created between Roland and Ellen. The Court held, that notwithstanding the absence of words of survivorship between Roland and Ellen, cross-remainders were manifestly intended by the testatrix, PENROSE, J., saying: "The stepson having died without issue in the lifetime of the father, the intention of the testatrix, as manifested by the will, will be defeated unless a limitation in the nature of a cross-remainder be implied in favor of the stepdaughter, so as to give her at the death of the father the whole. For if the share of the stepson is to be regarded as having absolutely vested in him, it follows that it passed under the intestate laws to the father, whose interest as to one-half of the fund thus became absolute, though the will said he should have but a life estate, and the interest which would thus vest in him would in turn have to be divested if the stepdaughter should also die in his lifetime without issue, since in that event the entire share is by the express terms of the will to go to the daughter of the testatrix. (See *Atherton v. Pye*, 4 Durnf. & East 710; *Reo v. Clayton*, 6 East 628; *Burden v. Burville*, 2 East 47, note.) If, on the other hand, it became absolutely vested in the father, at his death, the stepdaughter having survived him, it must pass in part to the daughter of the testatrix, though the will declared she was not to take unless both of the stepchildren should die without issue. It is difficult to believe that such results were intended by the testatrix; and they are entirely prevented by holding that a cross-limitation is implied in favor of the stepdaughter. Such an implication is always a matter of intention.

"The general principles governing cases of this kind are thus stated by Mr. Theobald (*Theobald on Wills* 573): 'When the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several as tenants in common with a gift over upon the death of all, in certain events cross-remainders cannot be implied between them as there can be no intestacy, and cross-remainders would divest vested interests (*Skey v. Barnes*, 3 Mer. 334; *Broomhead v. Hunt*, 2 J. & W. 459; *Baxter v. Losh*, 14 Beav. 612; *Beaver v. Nowell*, 25 Beav. 551). If, however, the interests are not vested but contingent, with a gift over upon the death of all before the interests vest, the argument against an intestacy applies and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and, therefore, in all probability, cross-limitations would be implied, *Mackell v. Winter*, 3 Ves. 536; *Scott v. Bargeman*, 2 P. Wms. 68; *Graves v. Waters*, 10 Ir. Eq. 234.'"

Implication in Case of a Devise, with Limitation Over, on Death of Either of the Devisees.

It has been held that where the respective shares of the devisees are limited over to a third person on the contingency of the death of *either* without issue, there can be no cross-remainders by implication, *Baldrick v. White*, 2 Bailey (So. Car.) 442; but such a limitation may be so controlled by the context of the will as to raise cross-remainders; thus in *Allen v. Trustees of Ashley Fund*, 102 Mass. 262, there was a devise for life to a widow with remainder to the children of the testator equally to be divided, and "if either of the said children should die without leaving any heirs of his body lawfully begotten," then over, it was held, notwithstanding the phraseology of the limitation over, that the intent was to give cross-remainders.

Divestment of Cross-Remainders.

Where the limitation over is after the death of the particular tenants without issue, and one of them has issue, the cross-remainder becomes divested, *Harbison v. Swan*, 58 Mo. 147, and he becomes seized of a fee in his own share, and entitled to a contingent remainder in the land given to the other particular tenants.

Executory Devise.

THOMAS RICHARDSON AND MARY HIS WIFE, Plaintiffs
in Error vs. JOHN NOYES AND WILLIAM NOYES.

Supreme Judicial Court of Massachusetts, March Term, 1806, at Boston.

[Reported in 2 Massachusetts 56.]

A devise in these words, "I give unto my three sons A., B., and C. all my other lands, etc., also my will is that if either or any of them should die without children, the survivor or survivors to hold the interest or share of each or any of them so dying without children as aforesaid," passes an estate in fee-simple, determinable on the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise.

THIS was a writ of error brought in the county of Middlesex, to reverse a judgment rendered in this Court April, 1795, on a writ of *formedon in remainder*, wherein the said John and William demanded and recovered against the said Mary, then Mary Noyes widow, the seizin of sundry parcels of lands in Sudbury.

The original declaration contained three counts. The first states that John Noyes deceased, father of the demandants, devised the demanded premises to his son James in tail *remainder* to the demandants in *tail*. The second states the *remainder* to be devised to the demandants in fee. The third states the *remainder* to be devised to the demandants for life.

The parties agreed on a case, of which the following is the substance :—

That John Noyes, the testator, was seized in fee—that he made his will, which is in the case—that on his death his sons, John, James, and William, entered into the lands devised them, *prout lex postulat*—that afterwards partition was made, and the lands demanded assigned to James, as his purparty—that James afterwards intermarried with Mary Noyes, the defendant, and died leaving her *enceinte*—that she was afterwards delivered of a son, who lived a few days only, and died leaving the said Mary his next of kin and heir.

In the preamble of the will is this clause, "and as touching such

worldly estate as it hath pleased God to bless me with in this life, I do *devise* and dispose of the same in manner and form following." Then follows a devise of the *improvement* of his dwelling-house in Sudbury, and of one-third part of his lands in Sudbury to his widow, during her widowhood, and a legacy of £100, and all his household goods.

The testator then gives to Jonas Noyes, his oldest son, certain land without using any words of limitation.

Then follows a devise in these words. "Item, I give to my three sons, John Noyes, James Noyes, and William Noyes, all my other lands, with all the appurtenances lying in Sudbury, except the improvement of one-third reserved for my wife as above mentioned: also my will is that if either or any of my three last named sons, John, James, or William, should die without children, the survivor or survivors to hold the interest or share of each, or any of them dying without children, as aforesaid. Also my will is that my husbandry tools and negroes shall be equally divided amongst and between my three sons, John, James, and William, last mentioned, to be possessed by the survivor or survivors, *as above mentioned.*"

Then follows a devise of his lands in Mendon and Princeton to his four sons, Jonas, John, James, and William, to be equally divided among them. Here are no words of limitation.

Then a legacy of £200 is given to his daughter, Mary Maynard, the interest whereof to be paid her during the joint lives of her and her husband, Josiah Maynard. If she survives her husband, the principal to be paid to her: if she do not, then to be equally divided among her children, to be paid to them when they are twenty-one years old respectively.

Then a legacy of £300 to be paid to his daughter Eunice in three months after his decease.

Then follows the residuary clause in these words. "Item, I give and bequeath the residue of my estate, real and personal, to be equally divided amongst my said children, Jonas Noyes, John Noyes, James Noyes, William Noyes, Mary Maynard, and Eunice Noyes, above named; the share of my said daughter Mary Maynard to be kept in the hands of my executors, to be dealt out and finally disposed of as the above legacy to my said daughter is ordered above to be disposed of."

The testator appointed his oldest son Jonas Noyes and Elijah Smith his executors. The will bears date October 24, 1765.

The writ of error was argued before DANA, C. J., STRONG, SEDGWICK, and SEWALL, justices at a former term in Middlesex, by the Attorney-General *Sullivan*, and *Bigelow* for the plaintiffs in error, and *Parsons* and *Dexter* for the defendants in error.

The question was what estate did James Noyes take under the will, and upon this question the following opinion was now delivered by

SEDGWICK, J.—In every question arising on the construction of a will, it is alike dictated by justice, common sense, and the rules of law, that the first inquiry shall be, what was the true intention of the testator? And if that can be satisfactorily discovered, the next is, can such intention be carried into effect, consistently with the rules of law? And if so, such must be the decision.

The question on which this case depends is, what estate did James take under the first devise to him? If an estate tail, then are the demandants entitled to their judgment, otherwise not.

This general question may make it of some importance to consider. 1st. Does the devise give an estate for life to James, and a fee to his children, if he should have any, by way of executory devise, as was suggested by the Attorney-General in his argument? 2d. Did James and his brothers, by this devise, take an estate tail, with cross remainders either in fee or in tail? 3d. Did the three sons take estates in fee, respectively, determinable on the contingency of their dying without children, and on that contingency, vesting in the survivor or survivors by way of executory devise? James, under the will, took either an estate for life, in tail, or in fee.

1. Did he take an estate for life? The general rule of law laid down, and as far as is recollected, without contradiction, is, that *in a devise of lands to one without words of limitation, the devisee takes an estate for life only, unless it can be found from the whole of the will taken together and applied to the subject matter of the devise that it was the intention of the testator to give a fee. But if from the whole of the will so taken together and applied to the subject matter, it can be collected that the testator intended to give a fee, it ought to be so construed, in order to give effect to such intention.** And I do think that courts ought to

* Vid. Vin. Abr.—Bacon, Wooddeson, Comyns' Dig. their proper heads. *Rowe v. Blacket*, 1 Cowp. 235. *Hogoin v. Jackson*, 299. *Loveacres v. Blight and ux.* 352. *Denn. v. Gaskin*, 2 Cowp. 657—2 Black. Rep. 1045—*Right v. Sidebotham*, Doug. 759.

make liberal constructions of wills, and not to restrain in the consideration of those circumstances which tend to enlarge from life estates to fees; for I am satisfied that the idea expressed by Lord Mansfield in *Loveaces v. Blight** is correct. Speaking of the rule above mentioned, and the cases wherein devises had been construed to give only estates for life, he says: "I really believe almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For common people, and even others, who have some knowledge of the law, do not distinguish between a bequest of personalty and a devise of land or real estate. But, as they *know*, when they give a man a horse, they give it to him forever; so they *think*, if they give a house or land, it will continue to be the sole property of the person to whom they left it." The same idea that great man repeated almost as frequently as the subject came before him.

It is obvious that the will in this case was written by an unskilful person. Technical accuracy and precision are not therefore to be expected. We are inquiring for the intention of the testator; and it is clear from a view of the whole instrument, the preamble, the provision which he makes for all his children, and the ultimate disposition which he makes, by the residuary clause of any residue which might remain after the specific distribution, that he intended a complete disposal of all the property he should leave behind. And I have no doubt that he intended that his sons should take an estate of inheritance. Whether that can be construed to be the *legal* intention, as respects the first devise to Jonas, it is not necessary now to determine. The question is not before the Court; but that it was the *real* intention, I entertain not the smallest doubt. The fee was certainly intended to vest in children or grandchildren. Whether any of the latter existed at the time the will was made, or not, we are ignorant. But in either case no motive is suggested why the testator should entertain a more favorable regard for his grandchildren, and make a better provision for them than for his own children. That Jonas was a favorite son is evident by his being admitted to the executorship, and all the rest excluded. Yet, if by the first devise to him, he was intended to take a life-estate only, his children are almost wholly excluded from the succession: they have no chance of benefit, but from the residuary devise, except as to the lands in Princeton and Mendon. They are even less regarded than the chil-

* 1 Cowp. 355.

dren of the daughters, and greatly distinguished from the children of the other sons; a distinction which it is impossible should have been intended by the testator. From this consideration alone we might conclude, with a good degree of satisfaction, that an estate of inheritance, by virtue of the first devise to Jonas, was intended to be vested in him: and if so, there can be no doubt that as large an estate was intended to be vested in John, James, and William, by virtue of the devise to them. But there are other circumstances of great weight to be considered. A devise is given to the wife for life, determinable indeed on her marriage. He gives to her *the improvement* of the real estate. To the sons he gives the *land* itself; and even, in the devise to John, James, and William, this *improvement* is again mentioned as an exception during the continuance of the wife's estate. The supposition does not, I think, partake of great refinement, that the testator, when he devised the *thing* itself, intended to give his whole estate in it; and, when he intended *a term only*, he thought he had given only a right to the *temporary occupation*, which he meant to express by the word "*improvement*." The devise to his daughter Mary Maynard, as well in the specific legacy as the residuary clause, shows that he looked forward to his grandchildren, as intended to be benefited by his will, and to confer that benefit on them as the representatives of his own children, and as taking in succession from them. The anxiety which the testator showed to provide for his family, by vesting the *share and interest* of him or them, who should die without children, in the survivor or survivors, tends to strengthen this construction. If there should be children, the estate was, by implication, to go to *them*; if not, to the survivor or survivors. This *share and interest*, which was to go to the devisee and his children, if he had any, was to vest in the survivor or survivors if he had none. It then depended on the contingency of dying with or without children, whether either of the three sons should have more than his equal proportion of the devised premises. A devise to one, and if he die without issue, remainder over is an estate tail, from the manifest intention of the testator,* so also a devise to one, and if he die without children, remainder over, may be an estate tail.† Now with us all the children are heirs, and as this is a devise to the three sons and their children, or in effect heirs, it could not be an estate

* 1 Vent. 230. Cro. Jac. 448, 695. 1 P. Williams 229.

† 4 Burr 2246.

for life only. It was then intended to give an estate of inheritance, either in tail or in fee.

2d. Was an estate tail intended? I think not.

In deciding this question, an observation made by the counsel for the plaintiff in error is, in my opinion, of great weight, viz., that in construing language, the customs, manners, habits, or laws, relative to the subject matter of it, are to be taken into consideration. In England, lands conveyed to a man and his heirs, *generally* descend to his eldest male issue: if to a man and the heirs of his body, they descend in the same manner. If lands *here* are conveyed in the same manner, in the former case they descend to all his children, and in the latter to his eldest male issue. In England, if a devise be made to one and his heirs generally, or to the heirs of his body, and the devisee die, leaving an eldest son, and several other children, the whole goes to such son. But here, in that case, the above distinction would take place: the fee-simple would go to all the children, the fee-tail to the eldest son. In this case the children, if any, of the devisees, are to take: to them the estate is given by the will. Did the testator intend by *children* the eldest son? It is impossible for me to believe that he did. And if by children he meant, what in common parlance would be understood, all the children, then he intended a fee-simple and not a fee-tail. If by the devise to the "survivor or survivors" he meant that he or they should take, whenever there should be an indefinite failure of issue, and not till then, however distant that period might be, then he intended a fee-tail: and if by this expression he contemplated events which were to take place in the life of the devisees, then he did not intend a fee-tail. That this was the meaning of the testator is, in my opinion, clear from the will itself. The bequest of personal property, which immediately follows the devise to them, is in these words, "also my will is, that my husbandry, tools, and negroes shall be equally divided amongst and between my three sons John, James, and William, last mentioned, to be possessed by the survivor or survivors as above mentioned." This shows that it was the intention of the testator that the right to the real and personal estate should rest by survivorship, upon the happening of the same contingency. No other reasonable construction can be given of the expression "being possessed by the survivor or survivors as above mentioned." The survivors were to be thus "possessed," how and when? The devise answers the question: when "any or either of

them should die without children.” On the happening of that contingency, and *whenever* it do happen, the right accrues of being “possessed” *alike* of the real and personal estate. Did the testator intend that this right should accrue, when there should be an indefinite failure of issue, and not till then? An event which might not take place in a century? A period when neither the negroes, nor the husbandry tools would be in existence? The supposition is absurd. This view of the subject shows clearly that the event contemplated by the testator, which was to give a right by survivorship, was to happen within the lives of the immediate devisees; and therefore it cannot be considered as an estate tail, where the estate continues until there is an indefinite failure of issue. We may then, I think, pretty confidently conclude that the testator intended

3. That the three sons, John, James, and William, should take respectively an estate of fee-simple determinable on the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise.—Now whether this intention can or cannot be carried into effect, is not very material to be determined in this case, because the demandant’s right to recover depends on the devise being construed a fee-tail, which, I think, it is shown it could not be.—But I think the rules of law will recognize the devise as a fee-simple, and on that construction execute the plain intention of the testator. It is not necessary to constitute it a fee-simple, that it should be absolute. It may be a fee-simple *determinable*, as where lands are given to a man and his heirs, as long as *another* man shall have heirs of his body,* and the like. It may be a *base* fee, as where, in England, tenant in tail, by indenture inrolled, bargains and sells the land to another and his heirs, and afterwards levies a fine to the bargainee, the bargainee has a fee in the land, but it is only to endure as long as the tenant in tail has heirs of his body, and is therefore called *base*, as compared with the pure fee, which is in the original donor, and which has an absolute perpetuity belonging to it.† So also before the statute *de donis*, an estate to a man and the heirs of his body was a fee-simple conditional. These are conveyances other than wills: the vesting of estates in fee, by way of executory devise will be more

* Powell on Devises 230. Plow. 557.

† Powell on Devises 231. Plow. 557, vid. 1 Inst. 1, 6. 1 P. Will. 74, 75. L. Ray 1148.

particularly attended to hereafter. It will not be useless to take notice of the attention which has been paid by courts to a liberal construction of wills that the intention of the testator might be carried into effect.

In *Loveacres v. Blight et ux.** Lord Mansfield, in delivering the opinion of the Court, says: "Wherever there are words, either general or particular, or clauses in a will which the Court can lay hold of, to enlarge the estate of a devisee, they will do so to *effectuate the intention.*" In *Spalding v. Spalding*,† a devise, after the death of the testator's wife, to J. S. and the heirs of his body in fee, and if J. S. should die in the life of his wife, that W. should be his heir. J. S. did die in the life of the testator's wife, and yet, against the words of the will, it was determined that the estate should not go to W. but to the heirs of J. S. A devise ‡ to a son and his heirs, and if he die before twenty-one years of age, or without issue, then to another son: he did die before twenty-one years of age, yet it was adjudged that his issue should hold. In *Lexford v. Cheeke*,§ a devise to a wife for life, if she do not marry, but if she do marry, then with several limitations. She did not marry, and although the devise over, according to the expression, seemed to depend on the marriage of the wife, yet was it adjudged an estate tail. In *Robinson v. Robinson*,|| a devise to Launcelot Hickes, "for and during the term of his natural life," is construed an estate tail "to effectuate the manifest, general intent of the testator." In *Evans ex dimiss Brooke v. Astley et al.*¶ a devise, after several limitations to every son and sons of Charles Duckenfield, which shall be begotten on the body of Sarah, his now wife, although it was agreed by the Court that the words of the will made the sons joint tenants, yet because the construction must be agreeable to the intention of the testator, and as from a consideration of the whole will it appeared impossible that should have been his intention, but that the sons should take in succession an estate tail, it was accordingly so adjudged. In *Newland v. Shepherd*,** Mr. Shepherd, after the devise of several parts of his real and personal estate to several persons, devises the interest and produce of the surplus of his real and personal estate to trustees, their heirs, executors and administrators, in trust to pay and apply the produce and

* Cowp. 352. † Cro. Car. 185. ‡ Cro. Eliz. 525. Dyer 33 a in margin.

§ 3 Lev. 125. || 1 Burr 38. ¶ 3 Burr 1570.

** 2 P. Will. 194. See also *King v. Mellington*, 1 Vent. 230.

interest thereof for the maintenance and benefit of such of his grandchildren as should be living at the time of his death, until his grandchildren should come to the age of twenty-one years or be married; and he went no further, nor made any other disposition of his estate. It was however determined that this would pass the absolute right and property of the real and personal estate to the grandchildren. Let this case be compared with the one under consideration. In *White v. Barber** a devise to a child, with which the wife of the testator should be *enceinte* at the time of his decease, was construed, to effectuate his intention, to vest the estate in children born after making the will, and before the death of the testator. In *Statham v. Bell*,† the testator supposing his wife to be *enceinte*, made a devise to the child, if he should be a son, when he should attain the age of twenty-one years; but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters, he then having one daughter, when they should attain their ages of twenty-one years, with survivorship between the daughters. If they both should die before twenty-one, their moiety to go to the wife and her heirs forever; if she died, her share to go to them. The wife proved not to have been *enceinte*. The testator died, and so did the daughter without issue, and under age. It was determined that the wife should take the whole estate. A devise ‡ to *give to his children*, to dispose of § *at will and pleasure*; to a wife, to dispose thereof *upon herself and children*,|| give fees. A devise to A. for life, and then to his son, except A. purchases land of the same value for his son, and then the devisee shall sell: A. does not purchase; his son has a fee.¶ A devise to three daughters, and if one dies before the others, one to be heir to the other, gives a fee:** a case differing nothing in principle from the one under consideration. A devise to A. and if he dies under age, to the heirs of the devisor.†† So a devise to A. but if his father purchase land of like value, to another, A. has a fee.‡‡ So the words “whatsoever else I have in the world” have been construed to give a fee.§§ It would be endless to state, in the most concise manner possible, all the cases which have been decided on the same general principle of justice, carrying into effect the meaning of the testator, and for this, rejecting some words, supplying others, transposing words and

* 5 Burr 2703.

† Cowp. 40.

‡ 6 Mod. 110.

§ Ibid. 111.

|| Ibid. 4.

¶ Hob. 65. Cro. Jac. 599.

** 1 Rol. Abr. 833, l. 45. †† 2 Saund. 388.

‡‡ Hob. 65.

§§ 1 Salk. 239. 2 Ver. 637.

sentences, in some particulars contracting and in others enlarging ; and all this that the right, which a man has, of deciding according to his own will and pleasure, who shall enjoy, after his decease, the property he may leave behind, may be carried into effect. Instances of this kind are abundantly supplied by Viner, Comyns, Bacon, and by Gilbert and Powel on devises. Let the general scope, and tendency and reason of those decisions be compared with, and applied to the case under consideration. In this case the will was drawn by a man of no professional knowledge. The estate is certainly intended to go to the *children*, by which, on the part of the demandants, it is contended that the testator did not mean *children*, but *eldest son*, if there was one ; when, in all probability, neither the testator, nor the writer, knew there was any such course of descent. If there are no *children*, it is to go to the *survivor or survivors*, together with *husbandry tools* and *negroes*. When was this event, as contemplated by the testator to take place ? We are told whenever there should be *an indefinite failure of issue*, however distant the period. Whereas it is a thousand to one that the testator, so far from so intending, knew nothing of that artificial reasoning, which gave rise to the expression *indefinite failure of issue*, and probably had never heard it.

I have already stated that it was the intention of the testator that the three sons, John, James, and William, should take respectively, an estate of fee-simple, determinable on the contingency of their dying without issue, and, on that contingency, vesting in the survivor or survivors. This is an executory devise. Executory devises, as they respect estates of inheritance, are of two kinds. 1. A substitution of one fee for another which fails. 2. Of a fee to commence at a future time, without the support of a particular estate. This is of the former kind. Although the law will not recognize a *remainder* to take effect after the *expiration* of a fee, yet by way of indulgence to a man's last will and testament, conformably to the liberal intention of the statutes* of wills, and in favor of devisors, when otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be *substituted* as an alternative in the place of a fee before limited. Provided the substitution be to take place within a reasonable period of time. Devises of this nature are called executory, because the estates, thereby limited to take place, have *no present exist-*

* 32 Henry 8, c. 1. 34 and 35 Henry 8, c. 5.

ence, in consideration of law; but merely a capacity of *existence*, and being *executed*; taking effect when the contingency upon which they are limited, occurs. I shall mention some cases, as illustrative of the general description which I have given of executory devises. In the case of *Marks v. Marks*,* a devise of lands to a man's wife, remainder to his second son in fee, provided that if D. his third son, should within three months after the wife's death, pay £500 to C. his executors, etc., then the lands should go to D. and his heirs. This is a good executory devise: and the possibility descended to the heirs of D. notwithstanding D. died in the life of the wife. The famous case of *Pells v. Brown*† essentially settled the principles on this subject.—It has been called the *magna charta* in relation to it. It has been cited almost as frequently as executory devises have come before the Court, and always with approbation; and it goes the full length of deciding the present case. There the testator devised to A. his second son, and *his heirs forever*, and if he should die without issue, *living* B. his brother, then B. to have those lands to him and his heirs forever. It was adjudged that A. took an estate in fee-simple, and yet that the limitation to B. in fee was good, as an executory devise. Now if, in the case under consideration, the testator meant by the word *children* what the word imports; if he intended the provision for the children generally, then he intended it for the heirs of the devisees: then was it, in other words, a devise to the devisees and their heirs, a devise in fee. If he meant, by dying without children, truly a dying without children, and not an indefinite failure of issue, of which he knew nothing, and therefore could not mean; if, by survivors, he meant to comprehend none but the immediate devisees, then this case compares most exactly with the case of *Pells v. Brown*. In *Porter v. Bradley et al.*‡ a devise of lands to A. his heirs and assigns forever, and if he die *leaving no issue behind him*, then over; the limitation over was determined to be good, by way of executory devise. This compares in principle exactly with the case under consideration. In *Wilkinson v. South*§ a bequest of a term of years to the testator's son, S. Parker, and to the heirs of his body lawfully begotten, and to their heirs and assigns forever, *but in default of such issue then after his decease*, to go to the testator's grandson, his heirs and assigns forever, the limitation over was held to be good by

* 10 Mod. 419. 1 Stra. 129. S. C.

† Cro. Jac. 590.

‡ 3 Term R. 143.

§ 7 Term R. 555.

way of executory devise. And in deciding the case the Court went upon this principle, that if the words, "leaving no issue," shall from the whole will be understood leaving no issue at the time of *his* death, then a further limitation over will be good by way of executory devise. In *Roe v. Jeffery and others** a devise to T. F. and his heirs forever, and in case he should depart this life and *have no issue*, then to E. and M. and S. or the survivor or survivors of them, share and share alike; it was determined that the limitation to E., M., and S. was a good executory devise. The Chief Justice, in delivering the opinion of the Court, lays down the true principle; he says, "the question in this and similar cases is, whether from the whole context of the will we can collect that, when an estate is given to A. and his heirs forever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker." And I think nothing is more certain than that the application of that principle is decisive of the present case; for nothing can be more clear than that by the "dying without children" in this will was meant the death of the first taker.—I have entered thus fully into the consideration of the several questions which present themselves, out of respect to the former decision of the Court; and the very ingenious and able argument† of the counsel for the

* 7 Term R. 589.

† Having been obligingly favored with the following Note of Mr. Parson's argument for the original plaintiffs, it is, by permission, inserted here, as showing the probable ground taken by the Court in the former decision, which has now been reversed.

The plaintiffs rely upon the several propositions following, viz.:—

Prop. I. That a devise of certain lands to A. without using any words of limitation, conveys only a life estate to A. unless there are other words *in the will*, which show that the testator intended to convey a larger estate: Cases need not be cited to support this proposition, but see those in the margin.*

Prop. II. That there are no other words in this will, which can be applied to the devise to the three sons, John, James, and William, so as to show that the testator intended to give them a fee-simple.

The plaintiffs are not apprised of more than two paragraphs in the will which, when applied to the devise in question, can be urged with any color, as enlarging the estate devised to a fee-simple.

1st. The intention of the testator, recited in the preamble, of disposing of all his worldly estate.

2d. The proviso annexed to the devise to his three sons, John, James, and William.

* Doug. 763. *Right Lessee of Mitchell and ux. v. Sidebotham et al.* Cowp. 238, *Bowes v. Blacket*. Ibid. 355, *Loveacres v. Blight and ux.* Ibid. 306, *Hogan v. Jackson*.

defendant in error. I conclude, after the most deliberate attention which I can give the subject, that the former judgment was erroneous, and ought to be reversed.

As to the preamble, the plaintiffs know of no case where it has been adjudged that a devise to A. of certain lands was a devise in fee-simple, merely from the effect of an intention declared in the preamble, of disposing of all the testator's worldly estate; but they apprehend that the contrary has been frequently adjudged.*

Such intention, declared in a preamble of a will, operates in cases where the whole estate is not clearly devised, and there are in the particular devises, or in a residuary devise ambiguous words, which may be considered, either as descriptive of the estate intended to be given, or of the testator's interest in such estate. In the present case there is a devise of the residue of the testator's real estate, which is an ambiguous word, and may mean, either the testator's lands or his interest in those lands; but, when connected with the declared intention of the testator to dispose of all his estate, will undoubtedly pass a fee in the residue to the residuary devisees.†

The testator in this will, then, devises his whole estate, and executes his declared intention, without supposing that a fee-simple passed by the devise to his three sons, John, James, and William.

2dly. As to the effect of the proviso annexed to the devise to the said three sons, it is contended by the plaintiffs that it operates to enlarge the estate devised to them, but not so as to pass a fee-simple.

Prop. III. That the effect of the proviso, "also my will is that if either or any of my three last named sons, John, James, and William, should die without children, the survivor or survivors to hold the interest or share of each or any of them dying without children as aforesaid," is to give the three sons estates in *tail general*.

The plaintiffs admit that the regular technical limitation of an estate tail is by the words *heirs of the body*; but they say that *in a will*, where there are any words that sufficiently show that the intent of the testator was to create an estate tail, such intent shall prevail, notwithstanding any informality in the mode of expression. Thus

1st. A devise to A. *for life*, and after his decease, to his issue, is an estate tail.‡

2d. So a devise to A. and his issue is an estate tail.§

3d. So a devise to A. and if he die without issue, remainder over, is an estate tail.||

4th. So a devise to A. *and his heirs*, and if he die without issue, remainder over is an estate tail.¶

5th. So a devise to A. and his heirs, and if he die without heirs, remainder over, to one who is heir to A. is an estate tail.**

* Douglass 759, *Right, etc. v. Sidebotham et al.* Cowp. 352. *Loveacres v. Blight and ux.* Ibid. 657, *Den Lessee of Gaskin v. Gaskin.* 3 Wils. 414, *Progmorton Lessee of Wright v. Wright et al.* 2 W. Blacks. 889, S. C.

† Cowp. 299, *Hogan Lessee of Wallis v. Jackson.*

‡ 1 Vent. 214, 225. 2 Lev. 58. 2 Ld. Raym. 1440.

§ Gilb. Law of Dev. 33. Comyns Rep. 372. 2 Ld. Raym. 1440. 4 Term. R. 82.

|| Robinson's case cited 1 Vent. 230. Cro. Jac. 448. 1 P. Will. 229. 1 Vesey 24. 1 P. Will. 685.

¶ Cro. Jac. 695. Comyns Rep. 539. 3 Wils. 244.

** Cowp. 234. 3 Term R. 143. Cases Temp. Talbot 1, 2. Comyns R. 82. *Nottingham v. Jennings* 1 P. Will. 23, S. C. 1 Ld. Raym. 568, S. C. Cro. Jac. 415.

SEDGWICK, J., then observed that the late Judge STRONG had before his death declared his concurrence in the same opinion; and that SEWALL, J., had also authorized him to say that he agreed in the result.

6th. So a devise to A. and his children, he not having children at the time of the devise, is an estate tail.*

7th. Also, which is the present case, a devise to A. and if he die without children, remainder over is an estate tail.† Butler, J. says, "children and issue, in their natural sense, have the same meaning; not so the word heirs." Lord Chief Baron Gilbert says,‡ a devise to A. and if he die *not having a son*, adjudged an estate tail. A fortiori, if he die without children.§ A devise to A. and if he die not having a son, then to remain to the heirs of the testator, adjudged an estate tail.|| Testator devises all his lands, etc., to his wife E., and if it should happen that his wife E. should have *no son or daughter*, by him begotten on her body, and *for want of such issue*, remainder over decreed that the wife E. had an estate tail.¶ A devise of all the testator's real estate in B. to A. M. during her life, and at her death to her children, on condition that she or they pay £30 yearly to C. and *in case of failure of children of A. M.* a devise over; adjudged that A. M. took an estate tail.

It will be very singular if the defendants should deny that *children* in this will is a word of limitation, tantamount to issue. For as James left but one child, and not children, had that child been now living, it could not have taken his father's third part upon any other construction, than that contended for by the plaintiffs, and the devise over would have taken effect, as the event of dying *without children* has in fact happened.

Prop. IV. Where *lands* are devised to A. and if he die *without issue* or *without leaving issue*, then a devise over, the construction of law is, *whenever there shall be a failure of issue*, the devise over shall take effect: but if *personal estate* is so devised, then the construction of law is, that *upon A.'s dying without leaving issue at his death*, the devise over shall not take effect.**

If the defendants should contend that in this case James had a fee, and that the survivors would take by way of executory devise, if James had left no child at his death, as in the case of *Pells v. Brown*,†† it is answered that in that case of *Pells v. Brown*, an estate in fee-simple was expressly limited to Thomas, and the devise over was not on his dying without issue generally, but on his dying without issue in the lifetime of William. This construction would be repugnant to the proposition last laid down and established,‡‡ to the case of *Chadock and Cowley*,§§ and to the following proposition.

Prop. V. Words in a will shall not be construed to give an estate by executory devise, but where the devisee cannot take any other way. |||

* 1 Vent. 231. Moor. 397. 6 Co. 17. Wyld's Case. Doug. 431, 321. 2 W. Blacks. 1083.

† 3 Term Rep. 493. *Doe Lessee of Comberbach et al. v. Perryn*.

‡ Law of Dev. 39.

§ 1 Vent. 231, where Hale, C. J., cites Byfield's case.

|| 1 Tr. Atk. 432, *Wyld v. Lewis*.

¶ Doug. 431, *Hodges v. Middleton et al.*

** 1 P. Will. 667, *Chapman v. Forth*. 6 Bro. Part. Cas. 309, *Keiley et al. v. Fowler*. Cowp. 410, *Den Lessee of Gearing v. Shenton*. 2 Ver. 616, *Southby v. Stonehouse*. Com. Rep. 373, *Walter v. Drew*.

†† Cro. Jac. 590.

‡‡ Vid. also 1 East R. 259, *Wood and ux. v. Baron*.

§§ Cro. Jac. 695.

||| Com. Rep. 373, *Walter v. Drew et al.* *Goodtitle Lessee of Winckles v. Billington et al.* 2 Ver. 610, *Southby v. Stonehouse*. 2 Saund. 388. 1 East. 263.

The Chief Justice, apprehending himself interested in the event of the cause, declined giving any opinion. THATCHER and PARKER, Justices, not having been present at the argument of the cause, gave no opinion.

Judgment reversed.

It may be added that, admitting the words *dying without children* equipollent to *dying without issue*, the case of *King v. Rumball** will decide the present case in favor of the plaintiffs.

Prop. VI. That the remainders expectant, on the estates tail devised to the three sons, John, James, and William, were devised to the survivors and survivor in tail.

That these remainders were devised over to the survivors and survivor, provided the three sons took estates tail, there can be no doubt; but it may be questioned what estate the survivors have in those remainders.

Now it is immaterial in this action, whether they took for life, in tail, or in fee; for in either case the plaintiffs will have judgment. However the plaintiffs conceive that the devise over is a devise in tail; or, in other words, that the survivors take the same estate in the remainder, that the three sons had in the lands; because the will provides that the survivors shall hold the *interest or share* of him, who should first die without issue.

The case of *Pettywood v. Cook*† was a devise of three houses to three children and *their heirs* severally, and if any of them died without issue, then the survivors should enjoy *totam illam partem* equally divided between them. It was adjudged that the devise over was for life only; because *totam illam partem* meant all the house, and not all the estate, which the party dying had in the house. It may well be doubted whether this case is law, and in the new edition of *Bac. Abr.*‡ this case is cited, and a quere subjoined, why the survivors did not take an estate tail. But the case at bar is very different; here the testator uses the words *interest or share*, which must necessarily mean the whole interest, which the son dying without issue had in the lands devised to him.

Prop. VII. That the remainders devised to the survivors and survivor are *vested*, and not *contingent* remainders. The determination of this question is not necessary for the decision of the cause, for if these remainders are contingent the contingency has happened.

The only reason why these remainders can be supposed to be contingent, is the uncertainty of the persons who will be the survivors, but such reason is insufficient. To make a remainder contingent, it must be limited upon an event, which, in contemplation of law, may never happen, or at least not happen until after the determination of the particular estate.§

Now the law contemplates as certain the determination of every estate tail; and also that of two or more persons, there will be survivors, and a longest liver.||

The plaintiffs conclude with mentioning one obvious principle of law: That nothing which happens after the *death of the testator*, can vary the construction of the will, or the rights of the parties claiming under it.¶

* Cro. Jac. 448.

† Cro. Eliz. 52.

‡ Vol. 4, p. 259.

§ Fearne cont. rem. 3, etc.

|| Fearne 369, 370, 371, and the cases there cited.

¶ 1 Vez. 153, *Bagshaw v. Spencer*. Doug. 494, *Doe Lessee of Fonnereau v. Fonnereau*, note [1].

BELLS v. GILLESPIE.

Court of Appeals of Virginia. Decided June 11, 1827.

[Reported in 5 Randolph 273.]

A will is made between the 1st day of January, 1787, and the 1st day of January, 1820, by which the testator gives to his sons several tracts of land, and if either of them should die without lawful issue, the part allotted to him to be equally divided among his *surviving* brothers, etc.; this is a fee-tail, and not an executory devise.

THIS was an ejectment brought in the Superior Court of Louisa county, by John Doe, lessee of Robert, George, Nathan, and Ashley Bell, surviving sons and devisees of George Bell, deceased, by his last wife, against David Gillespie.

At the trial, the jury found a special verdict, the substance of which is fully stated in the opinion of Judge CARR. The Superior Court gave judgment for the defendant, and the plaintiff obtained a *superseas*.

This case, and the following one of *Broaddus v. Turner*, involving the same principles, were argued together.

Leigh, for the appellant, referred to the cases of *Pells v. Brown*, Cro. Jac. 590; *Fearne on Cont. Rem.* (Butler's edition), 468, 470; *Hill v. Burrow*, 3 Call 350; *Porter v. Bradley*, 3 Term Rep. 143; *Fearne* 474, notes; *Crooke v. De Vandes*, 9 Ves. jr. 197; *Roe v. Jeffery*, 7 Term Rep. 589; *Hackley v. Mawley*, 3 Bro. Ch. Cas. 82; *Goodrich v. Harding*, 3 Rand. 280; *Hill v. Burrow*, 3 Call 342; *Tate v. Tally*, 3 Call 354; *Sydnor v. Sydnor*, 2 Munf. 263; *Gresham v. Gresham*, 6 Munf. 187; *Timberlake v. Graves*, 6 Munf. 174; *Didlake v. Hooper*, Gilm. 194; *Butler's Fearne* 474, citing *Roe v. Scott*, in a note; *Richardson v. Noyes*, 2 Mass. Rep. 56; *Butler's Fearne* 478; *Frodick v. Cornell*, 1 Johns. Rep. 439; *Morgan v. Morgan*, 5 Day's Rep. 517, cited in 4 Com. Dig. 186 (new edition); *Lyon v. Burtiss*, 2 Johns. Rep. 483.

Stanard, contra, referred to *Fearne* 418, 419 (Butler's edition); *Bryce v. Smith*, Willes's Rep. 1; *Sydnor v. Sydnor*, 2 Munf. 263; *Roe*

v. *Scott*, cited in *Fearne* 474; *Clatchey's Case*, *Dyer's Rep.* 330; *Chaddock v. Cowley*, *Cro. Jac.* 695; *Holmes v. Minet*, *T. Raym.* 452; *Wright v. Halford*, *Cowp.* 331; *Lillybridge v. Ady*, 1 *Mass. Rep.* 224; *King v. Rumball*, cited in *Fearne* 243; *Fearne* 476; *Id.* 479, 485; *Forth v. Chapman*, 1 *P. Wms.* 667; *Tite v. Willis*, *Talbot's Cases*; *Barlow v. Salter*, 17 *Ves.* 479; *Doe v. Ellis*, 9 *East* 382; *Tenny v. Agar*, 12 *East* 253; *Romilly v. James*, 6 *Taunt.* 263; *Doe v. Fonnereau*, *Doug.* 504; *Anderson v. Jackson*, 16 *Johns. Rep.* 382.

June 11. The Judges delivered their opinions.*

CARR, J.—This is an action of ejectment. The jury have found a special verdict, of which the following abstract contains the material facts in the cause. On the 3d of March, 1787, George Bell made and published his will in due form, and died in the same year. He had (as appears from the will) a son and daughter by a former wife, and five sons by the second. To the children by the first wife, he gives some trifling articles of personal property. He lends to his wife, during life or widowhood, a tract of land particularly described, and some personal property. To his son George, he gives a tract of land, he paying to his younger brothers £20 apiece, as they arrive at age. To his sons, Nathan, Ashley, and Anthony, he gives the balance of his land, to be equally divided among them. To these devises, there are no words of inheritance superadded; but it may be plainly collected from the will, that the testator meant to give them the fee. Then comes the clause on which this case depends. "I give and bequeath unto my son Pleasants the land which I lent to my wife before mentioned, containing one hundred and fifty acres, to him and his heirs, after the decease of my widow, or sooner if she marries, as before provided; and further my will is, that if either of my said sons, to whom I have bequeathed lands, should die without lawful issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife."

In 1804, the widow and Pleasants sold and conveyed the land to the defendant. In 1805, Pleasants died, without marriage or issue, and the widow in 1815. The plaintiffs are the surviving brothers by the

* The President absent.

last wife. The Court below decided the matters in law arising on the verdict to be for the defendant, and judgment was rendered accordingly; from which the appeal is taken.

The question is, what estate did P. Bell take in the land? Was it a fee-simple, with an executory devise over to the surviving brothers? Or, was it an estate tail, enlarged by our statute into a fee?

Executory devises are a mere indulgence granted to men's wills, lest the intention of the testator should be wholly defeated, and are only resorted to when the limitation can in no other way be sustained. Hence the rule laid down by Lord Hale in *Purefoy v. Rogers*, 2 Lev. 39, that a limitation, which by possibility may take effect as a contingent remainder, shall never be construed an executory devise. As executory devises tend to a perpetuity, the policy of the law has restricted them to a reasonable time; which has been settled to be a life or lives in being, and twenty-one years after. Unless they are so limited that the event on which they depend *must* happen within this period, they are void in their creation. Thus, a devise to A. and his heirs, and if he die without issue *living at his death*, then to B. and his heirs, is an estate in fee to A. with an executory devise to B., and the devise to B. is good, because the event which determines its existence or non-existence, is B.'s death. So, if in any other way, it appear by "fair demonstration," that the testator intended to limit the dying without issue to the period established by law, the executory devise will be valid. But, a devise to A. and his heirs, and if he die without issue, to B. and his heirs, can vest no estate in B. *by way of executory devise*; because, coming after the estate tail in A. it may take effect as a remainder; and even if this objection did not exist, it would be void as an executory devise; because, being limited after an indefinite failure of issue, it is too remote. In England, estates tail may be destroyed by fine and recovery; with us, by statute. In either case, the remainder falls with the particular estate which supported it. But if, instead of a remainder dependent on an estate tail, it be an executory devise after a fee-simple, it cannot be affected either by the fine and recovery of the tenant, or the operation of our law. Hence the struggle so often repeated in the English Courts and ours, between the alienee, heirs or devisees of the first taker, and those who claim as executory devisees.

In our case, after giving each son a fee-simple in his land, the testator says: "My will is, if either of my sons should die without lawful

issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife." What did he mean? Did he look to a definite or indefinite failure of issue in the first takers? It seems to me clear, that he meant that the land given to each son should be enjoyed by the family of that son, so long as any branch of it remained; and that whenever it failed, the land should go over. That he meant the issue of the first taker to enjoy the land, so long as they lasted, is directly and positively declared. Why should he fix an earlier period, than the failure of this issue, as the epoch at which the second limitation should be determined? P. Bell and his immediate family were the first objects of his bounty; his other sons and their families, the second. Why should he fix the period of Pleasants' death as the moment at which, if his brothers could not take his estate, they never should take? Suppose P. Bell had left a child at his death, and that child had died the day or the hour after him. Did the testator mean, in such a case, that his other sons should have no part of, or interest in, P. Bell's land? I can neither feel nor understand the motive which could prompt a father to this. Why he should postpone the interests of his other sons to the failure of the issue of P. Bell, I can clearly see; but I cannot perceive why *time* should be so important with him, as that he should say to his other sons, "though it is my will that you have the land of P. Bell if he has no child at his death, yet if he leave a child, you shall not have it, though that child die the next hour." If he had had this idea in his mind, would it not have been more natural and direct to have said: "It is my will, that if either of my sons die without issue *living at his death*, his part shall be equally divided among his surviving brothers?"

It is insisted, however, that express words are not necessary to tie up the failure to the death; that any words which make the intention clear are sufficient; and that those used here leave no doubt of the testator's meaning. The words are, that the part of the son dying without issue "be equally divided among the *surviving* brothers, children of my last wife." Great reliance was placed on the words "*surviving* brothers;" but the word *survivor* is not a word of limitation. *Dying without issue*, have been long settled as words of limitation, giving an estate tail. The question is, do these words, *surviving* brothers, indicate so strong an intention to tie up the failure of issue to the death of the first taker, as to prevent the words *dying without issue*, from having their

settled meaning and effect? There are numerous cases upon this subject. I shall not attempt to cite them all; nor to reconcile them with each other. I will state a few to show the ground on which I rest, in thinking that the words *surviving brothers* have not the effect contended for.

Chadock v. Cowley, Cro. Jac. 695, decided four years after *Pells v. Brown*, and by three of the same Judges. The testator devised all his lands in B. to Thomas, his son, and all his lands in E. to F. his son; and added: "*Item*, I will that the *survivor* of them shall be heir to the other, if either die without issue." *Held* by all the Judges (*absente* Lea, C. J.), that it was an estate tail in Thomas.

In *Hope v. Taylor*, 1 Burr. 268, R. S. devised to J. W., his sister's eldest son, his house in the brook with the outbuildings and £30; to his nephew R. T. £50; to his nephews C. T., R. T., W. T., 29 acres of arable and meadow land, etc.; then to W. T., his sister's son, the house in question, and gives him also £10; to his brother-in-law, W. T. £5; and declares his will and meaning to be, that if either of the persons before named die without issue lawfully begotten, then the said *legacy* shall be divided equally between them that are *left alive*. Lord Mansfield and the whole Court decided, 1st, that the word *legacy* comprehended the land as well as the personal estate mentioned in the will; 2d, Lord Mansfield said, the testator meant this second clause as a restraint on the first, and meant that the issue should have it; and the whole Court decided that an estate tail was given.

In *Roe v. Scott & Smart*, decided in C. P. 27th George 3d, 2 Fearn 209; testator devised certain lands to his son James, to him, his heirs and assigns forever; other lands to his son John, to hold to him, his heirs and assigns forever; other lands to his son Thomas, to hold to him and his heirs and assigns forever; and after charging the land of Thomas with an annuity, added, that his will and mind was, that if either of his three sons should depart this life without issue of his or their bodies, then the estate or estates of such sons should go to the *survivors* or *survivor*; and if all his said sons should happen to die without such issue, then he devised all the said premises to his four daughters, their heirs and assigns forever. *Held*, that the sons took estates tail. It would be difficult to distinguish this case from the one before us. They are alike in all their branches; the fee given to the three sons; then if either die without issue, his estate to the *survivor* or

survivors. If it be objected, that the word *estate* here operates to carry the fee to the second taker, I will show presently that our case has this feature also.

In *Barlow v. Salter*, 17 Ves. 479, the devise was in these words: "All my estate, real and personal, to my daughter, M. V. to her and her heirs, and half the navigation money for her natural life; and in case she dies without issue, *all* to be divided between my four nephews and nieces, N., W., C., and E.; C.'s part only for life, and her part to be divided between the *survivors*." The bill was filed by one of the nephews against the daughter, praying that the nephews and nieces might be declared entitled on the event of the daughter's dying without issue living at her death, and praying an account accordingly. It was admitted that there was no real estate; and this makes the case the stronger; for, it is well known that slighter words will be taken to tie up the failure to the death, in personal than in real property. The Master of the Rolls went into the consideration of the words "in case she dies without issue." The Judges in some of the early cases, he said, had inclined to hold these words to mean *issue at the death of the person named*; but, he thought that ever since the case of *Beauclerk v. Dormer*, a different rule had prevailed. "The Court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one; which however is done, where the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restrictive intention. The single circumstance in this case relied on in favor of the restrictive construction is, that one of the four persons to whom the bequest over is made, is to take a life interest in her part, which is to be divided equally among the survivors." In a further part of his opinion, he observes that the word "*survivors* as used here, has the same sense as the word *others*, as has been frequently decided." He concludes by pronouncing it an estate tail in the daughter, and dismissing the bill.

Let us come now nearer home, and examine some of the decisions of this Court. If I mistake not, we shall find that they settle this question even more conclusively than the English cases.

Carter v. Tyler, 1 Call 143. Will made in 1759. "My will is, that my son W. C. have all my lands" (describing a particular tract), "to him and his heirs lawfully begotten, forever, etc. I give to my son J. C. all the remaining part of my land," etc. (describing the tract),

“to him and his heirs lawfully begotten, forever; and if either of my sons should die without issue, my will is that the whole go to the *survivor*; and if they both die without issue lawfully begotten, then my will is, after my wife’s death, that the lands be sold, and the moneys thereon be equally divided between my daughters *then living*, and their heirs forever.” I consider this a case deserving the utmost weight. It is the first we meet with in our books, after the passing the laws docking entails. It was decided by the unanimous opinion of the Court, consisting of Pendleton, Lyons, Carrington, Fleming, and Roane. These venerable and able men were actors in those eventful scenes which gave birth to these laws; some of them, probably, members of the Legislature which passed them. The cause was argued with great learning and ability by the most distinguished counsel then at the bar. Mr. *Call* and Mr. *Washington* put forth all their strength to prove that the limitations over were not destroyed by the statutes. The ground was taken very strongly, that they were executory devises. But the Court, in a clear, forcible, and decided opinion, delivered by their President, pronounced that the sons took estates tail, and that the limitations over were void.

Let us examine for a moment the points of resemblance between this case and the one at bar. I think we shall find that it contains much stronger evidence than ours, of an intention to tie up the failure of issue to the death of the sons. 1st. If one of them die without issue, the whole goes to the survivor, without any words of inheritance super-added. 2d. If both die without issue, then, *after my wife’s death*, the lands to be sold. Here is a provision which shows that he thought the event he was contemplating (the death of his sons without issue), might occur in the life of their mother; strong to evince that it was not an *indefinite* failure of issue. But, this is not all. 3d. The lands were to be sold, and the moneys thereon to be “equally divided among my daughters *then living* and their heirs.” When living? Why, living at the death of the sons without issue, and of the mother, if she should survive them. To me this appears vastly stronger than the case at bar, to show an intention to restrain the failure of issue to the death of the sons; and yet a full Court unanimously decided against the executory devise. This decision was made in 1797, near thirty years ago. It has never been questioned, but often referred to by the later cases as authority. If we now overrule it, who can tell how many titles, rest-

ing on the basis of this very decision, we may shake to their foundation?

The next case is that of *Hill v. Burrow*, 3 Call 342, decided in 1803. The contest was renewed upon the old battle-ground; whether it was an estate tail, or a fee with an executory devise limited upon it. The intention of the testator, and its decisive weight in the construction of wills, were strongly pressed; and *Porter v. Bradley*, *Roe v. Jeffery*, and that whole class of cases brought before the Court. They were again unanimous in their decision that it was an estate tail. Judge Lyons has the following sound and pertinent remarks: "It is to no purpose to be arguing about the intention, unless the words will authorize a restricted construction; for, mere intention cannot prevail against a settled rule of interpretation, which has fixed an appropriate sense to particular words: because, when the sense is once imposed, they become the *indicia* of the testator's mind, until the contrary is shown by countervailing expressions. It is better that it should be so, too; for the law ought to be certain; and where the rule is once laid down, it should be adhered to. Otherwise, what is called *liberality* at the bar, will degenerate into arbitrary discretion, and all depends upon the will of the Judge." He adds: "An infringement of the rule, instead of supporting the Legislative intention, would go directly to defeat it; and would tend, under the notion of executory devises, to introduce that very clog to alienation which the statute meant to abolish."

The case of *Tate v. Tally*, 3 Call 354, followed soon after. The words of the devise were nearly the same; but the will was made after the Act of 1776, and this furnished to the ingenuity of counsel a ground of distinction at least plausible. Mr. Wickham pressed this point with great power. He argued, that in England estates tail were implied for the benefit of the issue: that here such implication would have exactly the contrary effect: that a devise of *lands* since 1776, should be placed on the same ground with *personal estate*; because, the first devise will now give the whole estate in lands as in personals; and the implication would disappoint the intention of the testator. The Court, however, held fast to the former decisions, pronounced it an estate tail, and that the construction must be the same since as before the statute.

Next comes the case of *Eldridge v. Fisher*, 1 Hen. & Munf. 559. Will in 1784. Devise of land and personal estate to his son and his heirs, and if he die without lawful heirs, to the grandson of the testator.

The counsel for the grandson, in whose favor the Court below had decided, said that after the former decisions he should surrender the case, if it did not present an important distinction. Real and personal estate were devised by the same words in the same sentence. The whole Court considering the case settled, decided the estate of the first taker to be an estate tail, and reversed the judgment of the Court below.

Sydnor v. Sydnor, 2 Munf. 269. Will in 1779. Testator gave to his four sons a tract of land each, to him and his heirs forever. "And it is my desire, that if any of my four sons should die without heirs of their bodies, that then the parts of them so dying, shall be equally divided among the survivors and their heirs." One of the sons died without issue, and devised his land to a nephew. The surviving brothers sued for it; and the Court below, on a special verdict, decided the law to be for them. On the appeal, great reliance was placed on the word *survivors*, and the whole doctrine again gone into. The Court unanimously (Fleming, Roane, Brooke, and Cabell), considered it a settled case; and without delivering opinions, reversed the judgment of the Court below. I consider this a case strongly in point. The only imaginable distinction between it and the case at bar is, that there the devise is to the *survivors and their heirs*; in our case, to the *survivors*, without words of inheritance superadded. But to me, this seems a distinction without a difference. For I hold, that in this case equally as in that, the survivors were intended to take, and would take (if they took at all), a fee-simple. Because, in the commencement of his will, the testator declares his intention of disposing of his *worldly goods*; and we know that these words, and others of the like kind, will, in favor of intention, and to prevent a partial intestacy, be transposed to any subsequent devise in the will, and make such devise as effectual in carrying the fee, as if words of inheritance had been used. For the reasoning and authorities on this subject, I refer to *Goodrich v. Harding*, 3 Rand. 280.

The other cases in our books on this subject, are *M'Clintick v. Manns*, 4 Munf. 328; *Tidball v. Lupton*, 1 Rand. 194; *Kendall v. Eyre*, 1 Rand. 288, and *Goodrich v. Harding*, 3 Rand. 280. These cases are in perfect harmony with the former, and present an unbroken series of decisions for the last thirty years. Surely this ought to settle the law.

As to the idea that the law of 1819 is an expression of the Legislative opinion, that the Courts have heretofore decided wrong on this subject, and furnishes us with a fair opportunity to break the toils in which former decisions have bound us, I would remark, 1. That it is not the province of the Legislature to censure the exposition which the Courts give to any law; nor ought we to impute to them, on slight ground, such usurpation; 2. That the words of the Act imply no such censure; but acknowledging the existing law to be as settled by the Courts, mean merely to change it for the future; saying that in a *will* or deed *hereafter* made, a contingent limitation depending upon the dying of a person without *heirs*, *heirs of the body*, issue, issue of the body, etc., shall be held to take effect, when such person shall die without heir, issue, etc., *living at the time of his death*, or born within ten months. This law is entirely prospective. The Legislature have justly thought, that to give it an *ex post facto* effect, would be wrong. Shall the Courts then give it such operation? So far from this law furnishing a fair opportunity to overturn the settled course of decisions, I think it shows us the propriety of a different line of conduct, of leaving this subject exactly where the law has left it. The great advantage which a change of the law by the Legislature has over a change by the Courts (even if this could properly be done), is, that the one is a public rule, binding all alike, and looking to the future only. The other is a rule, which, as the Court makes, it may break; and which affects past as well as future cases. For the last century or two, dying without heirs, issue, etc., has been settled to mean a general failure, not tied up to the death of the first taker. If we say now, that these decisions are all wrong, will not our successors have more right to reverse our decision than we have to reverse one with the frost of centuries upon it? But our decision will be retrospective; for, as we do not assume the power of *making*, but only *declaring*, the law, if we say that these decisions are wrong, all the estates which have been settled, all the contracts which have been made, all the titles which rest on the foundation of their correctness, are uprooted. Nor can we see the extent of the mischief. A few cases only have come before us, for some years back; because, the law being settled, counsel would generally advise against it. But, only open the door; proclaim to the world that all which has heretofore been done is wrong; and then we shall see the wild uproar and confusion among titles which will follow. Is it not better to pre-

vent this, by holding on in the course we have so long run? The cases which arose prior to the law of 1819 must cease after a time; and then that law settles the matter.

GREEN, J.—If in this case, the limitation over to the surviving brothers of Pleasants Bell, had been to them and their heirs, no question could have been raised, that the intention of the testator to provide for the issue of Pleasants indefinitely, so long as any existed; and upon the general failure of his issue, for his brothers and their heirs, would have reduced the express estate in fee given to Pleasants to an estate tail, for the purpose of effectuating this general intention, which could not, upon any other construction, be carried into effect. It would be precisely the case of *Sydnor v. Sydnor*, 2 Munf. 269, over again. In that case, it would be immaterial to determine whether the testator intended by *surviving brothers* all the *other brothers*; a meaning sometimes given to the word *survivor*; or whether he intended only such of the brothers and their heirs who survived Pleasants, to take. In either case, the limitation over would be a remainder after the estate tail; in the first case, vested, in the other, contingent; and in both, defeated by the operation of our statute converting estates tail into absolute estates in fee-simple.

It is however insisted, that as the law was before the 7th day of October, 1776, the limitation over to the surviving brothers, without the words *and their heirs*, or any other words of perpetuity, gave them only life estates, upon the contingency of their surviving Pleasants; and as that contingency must happen within a life or lives in being, the limitation over could be supported as a good executory devise; and therefore there is no necessity to reduce, by construction, the express estate in fee given to Pleasants, to an estate tail, in order to effectuate the intention of the testator. This would be true, if there was nothing to prove that the limitation over to the surviving brothers was a limitation of the fee, and if the case of *Roe v. Jeffery* is law, of which I doubt. It may, however, be admitted as law, for the purpose of this case. In inquiring whether the limitation over was of an estate in fee, I pass over the effect which the introductory clause of the will may have upon this question, and put it entirely upon the force of the Act of 1785, which took effect on the 1st day of January, 1787, and provided that "every estate in lands which shall hereafter be granted, conveyed, or

devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple, if a less estate be not limited by express words, or do not appear to be granted, conveyed, or devised, by construction or operation of law." The will being made, and the testator having died in 1787, after this Act was in force, the statute is decisive, that the surviving brothers took a fee, if any estate; and Pleasants, therefore, an estate tail, unless we are not at liberty to take into consideration the effect of this statute, in determining whether Pleasants took an estate tail or not. This question has an important influence in the construction of wills made since the first day of January, 1787, and before the 1st day of January, 1820, when the Act respecting executory limitations took effect, and ought therefore to be at once decided.

Estate tail were unknown to the common law. They were created by the statute *de donis conditionalibus*, which provided, "*voluntas donationis secundum formam in charta doni sui manifeste expressam de cætero observetur.*" In executing this law, it was the duty of the Court to ascertain from the whole will taken together, whether the intent of the testator was to provide for the issue of the first taker; and if so, without regard to the particular estates given in terms by the will, to hold that the first taker had an estate tail, if the issue could not otherwise be provided for, according to the intention of the testator. Thus, an express estate for life or in fee was converted into an estate tail, if that were necessary to effect this intent in favor of the issue. But, if not absolutely necessary for that purpose, the estate expressly given was not disturbed. This statute was in force in Virginia from the first settlement of the country until the Revolution; was adopted by the ordinance of the convention of May, 1776, with all other British statutes in aid of the common law prior to the 4th year of James 1st, as the law of Virginia; and continued in force until December, 1792, when it was repealed with all other British statutes. The statute *de donis* was in force when the will in question was made, and when the testator died; and if no other statute had any influence on the question, the Act of 1785 must have had a decisive influence on its construction. In England, and in Virginia, before the Act of 1785 took effect, a devise to one in fee, and if he died without issue, then to another and his heirs, was construed to give to the first taker an estate tail, notwithstanding the express estate in fee given by the terms of the will;

because it was apparent that the testator's intent was to provide first for the issue of the first taker, and after that, for the second taker and his heirs; both of which intentions would be frustrated, if the first taker had a fee-simple estate, since in that case the issue could claim nothing *per formam doni*, and the limitation over would be void, as being a fee mounted upon a fee. But the Court did not, by construction, destroy the express estate in fee given by the will, unless there was such a necessity for the sake of effectuating the testator's intention. If, therefore, he directed the estate to go over to another upon the death of the first taker without issue *then living*, there did not appear so decisive an intent in favor of the remote issue of the first taker; and the limitation over could take effect, in the event provided for, as an executory devise, and the testator's intent in that respect carried into effect. The express estate in fee, therefore, was not reduced by implication to an estate tail. Upon this principle, a limitation over of an estate for life was held to be a good executory devise, and not to affect the fee given to the first taker; and a limitation to one, without words of perpetuity, was, in effect, the same as an express limitation for life. In that case, if there were no ultimate limitation over of the fee, the heir of, or the purchaser from, the first taker, would be entitled to the estate in fee-simple, after the estate for life expired.

After the 1st of January, 1787, a limitation over without any words of perpetuity or limiting a smaller estate, gave a fee; and the reason, upon which a limitation over for life was held to be good as an executory devise, no longer existed. Every reason, upon which it was thought necessary to limit the estate of the first taker to an estate tail, when the limitation over was in fee, would apply to the case arising under the statute. Can it be for a moment supposed, that if a statute like ours of 1785, was passed in England, it would not have this effect upon the construction of wills there? If it had not, the most extraordinary consequences would follow. The person to whom an estate was given after the failure of issue of the first taker, upon the argument that he was only entitled to an estate for life, having gotten the estate on that ground, would be entitled to it in fee; whereas, if he was only entitled in reality to an estate for life, the fee would remain to the heirs of the first taker, or the purchaser from him. In other cases, other consequences as absurd as this would arise. *Loddington v. Kime*, 1 Salk. 224. Thus a devise to A. who has no child, for life, and then to

his issue and their heirs; if he should have any, and if he die without issue, then to B. and his heirs; A. would be entitled to an estate for life only, with remainder in fee to his issue as they came *in esse*, if he had any; and if not, then remainder to B. and his heirs. 3 Salk. 126. But if the devise was, before the Act of 1785, to A. for life, and to his issue if he have any, and if he die without issue, then to B. and his heirs; A. would have an estate tail, with remainder in fee to B. In both cases it is apparent that the testator meant to give only a life estate to A., and provide for the issue of A., as long as he had any; and then for B. and his heirs. In the first case, all those objects are effected by the estates expressly given by the testator, because the estate given to the issue of A. is a fee. But in the other, an estate for life only being given to the issue of A., the testator's object of providing for A.'s remote issue would be frustrated, unless A. was held to have an estate tail; by which, all the testator's intentions would be carried into effect, except only that of limiting an estate for life to A. Suppose, after our statute of 1785, we refuse to apply the rule prescribed by it to a case like the last stated. Then the estate tail of A. raised by implication, being converted by our statutes into a fee-simple, the intention of the testator, both as to the issue of A. and B., and the estate of A. would be utterly frustrated. But apply the rule furnished by the statute, and consider the issue of A. to be entitled to a fee-simple; and the testator's intentions as to A. and the issue of A. and as to B. and his heirs, would be carried into complete effect, without defeating any part of his intentions. It is hardly possible that any Legislative provision could have been intended to produce such consequences. Let us examine the only statutes which can possibly be supposed to prohibit the Court from giving effect to the Act of 1785, in construing a will with a view to ascertain whether it created an estate tail or not.

The Act of October 7, 1776, only declared, that "any person who then had, or thereafter might have, an estate tail, should, from thenceforth, or from the commencement of such estate tail, stand *ipso facto* seized in full and absolute fee-simple." The Act of October, 1785, ch. 62, provided, that "every estate which, on the 7th of October, 1776, was an estate tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee-simple; and every estate which since hath been limited, or hereafter shall be limited, so that as the law aforesaid was, such estate would have been an estate tail,

shall also be deemed to have been, and to continue, an estate in fee-simple." The expression *as the law aforetime was*, refers to the law as it was before the 7th of October, 1776, when the Act converting estates tail into fee-simple estates passed. This is the literal import of the words; and so they were understood by the Legislature at the revision of 1819, in which the revised Act refers expressly to the law as it was before the 7th of October, 1776. Was it intended by this expression to refer to all the particular decisions in England and Virginia, anterior to the 7th of October, 1776, as the rules for decision in all future time, without regard to the effect which future laws might have upon the reasons on which those decisions were founded? Or, to adopt the principles upon which those decisions were founded? The decisions before that time were founded upon the principle, that where the intent of the testator was to provide indefinitely for the issue of the first taker, and that object could not be effected without implying an estate tail in the first taker, such an estate tail must be implied, although it controlled the will of the testator in respect to the particular estates given in terms by his will. This necessity to imply an estate tail, not given in terms, arose sometimes from the existing law of primogeniture, which would defeat the intent to provide for all the issue, unless the first taker was construed to take an estate tail; sometimes from the effect of the then existing law requiring words of perpetuity to give more than an estate for life; by force of which, the immediate issue of the first taker would be limited to an estate for life, unless the first taker took an estate tail. But, when the law of primogeniture was abolished, and all the issue admitted to participate in the inheritance, and an estate in fee was allowed to be given without words of perpetuity, by our statutes, the reason upon which the former decisions, turning on these points, were founded, was taken away. By preserving the ancient principles, and applying them to this new state of things, the results would be different; but in both cases, conforming, as near as possible, to the main intentions of the testator to provide for the issue. When the Act of 1785 was passed, the statute *de donis* was still in force; and by the expression *as the law aforetime was*, the Legislature could not have intended to say, that an *express estate tail* should be construed to be an estate tail; but it was easy to foresee, that when a question arose whether an estate tail should be implied or not, it might be argued that, as an estate tail could not exist after it was implied, there could

be no motive for implying it; and that, therefore, no such estate could be implied since the 7th of October, 1776; an argument repeatedly urged since, and overruled. It was to obviate this objection to implying estates tail, and for this purpose only, that the act declared that those estates which would have been fees tail *as the law aforesaid was*, should be deemed estates in fee-simple. It was absolutely necessary to declare, that estates tail might be implied from the intent of the testator to provide for issue, in order to effect the object of the Act of 1776, which was to give to the first taker the power of providing for his issue by giving them the estate, without compelling him to do so, wherever it appeared that the testator intended to provide for the issue; a policy which might frequently be frustrated, if an estate tail could not be implied. As if a devise were to A. for life, and if he died without issue, then to B. and his heirs, the obvious intention of the testator that the issue of A. should take, would be frustrated, unless A.'s life estate could be enlarged to a fee-tail (converted by the statute into a fee-simple), by implication: For, in no other way could they take anything in any possible event.

This construction would have prevailed upon the statute of 1776, if the Act of 1785 had not expressly prescribed it. That Act prescribed it from excessive caution; and upon the whole, I think the rule prescribed by the Act of 1785 was, that an estate tail should be implied whenever, *under our existing laws*, it was necessary to do so, in order to effectuate the intention of the testator in respect to the issue; the Act adopting for that purpose the reason of the law, and not the particular cases decided before the 7th of October, 1776; and that upon the reason of the law.

Pleasants Bell had, in this case, an estate tail, and not a fee, by force of the will; or, if he had an estate in fee simple by the will, the limitation over to his surviving brothers was in fee, and therefore void.

COALTER, J.—This case arises on the will of George Bell, made on the 3d of March, 1787, and on which will these questions arise:—

1. Whether Pleasants Bell took an *estate in fee* with remainder to his surviving brothers, which, by the Act of 1785, must be in fee, although no words giving a fee are in the will; and is that remainder limited on the contingency of a dying without issue *at his death*, so as to be good as an executory devise? Or,

2. Was it intended to give an estate tail to Pleasants Bell, which would be the case if an indefinite failure of issue was intended?

It is said to be an established rule, that when a devise is to *A. and his heirs*, and *if he die without issue*, or to him *generally*, and if he die without issue, it is an estate tail; and that this rule does not yield except to *express* declarations to the contrary, or to effect some obvious intention in his mind at the time. On the other hand it is said, that the happening of the contingency need not be tied down by *express* words; but, if it appears from the whole will together, it is enough; that this is a good limitation, at least according to the more modern decisions in England, and at all events, would be a good limitation of a personal subject; and, that however it may be, if an estate is given to one for life, and if he die without issue, as to *inferring* an estate tail, it is not so easily to be inferred when the first taker has an *express fee* by the will.

The difference between a will of real and personal property, in relation to estates tail by *implication*, is stated by Judge Pendleton in his clear and plain manner, in the case of *Dunn v. Bray*, 1 Call 294. He says, cases have been cited to prove that in a devise of lands to one for life or in fee, and *if he die without issue*, remainder over, etc., this would turn the first estate into an estate tail, in order to favor the testator's *intention* of *preferring the issue* to the remainder-man; but in principle, the distinction, in case of personal property, is clear, since the implication in the case of lands *to favor the intention*, would be misapplied, if made use of *to destroy that intention* in the case of personals.

Our Act of 1776 docking entails, and the Act of 1785 re-enacting that, and also dispensing with words of inheritance, introduced an entire new state of things in this State, on this subject. Lands were put precisely in the situation of personal property, not only as to the *want of power* to entail them, but as to the quantity of the estate taken, where no estate less than an absolute one is limited. Under this state of things it was reasonable to expect that the Courts would have construed wills of lands and personals, made after 1776, alike. It is said, however, that not only the Acts of 1776 and 1785 themselves, but our decisions under them, have tied us down to construe wills as to real estates made since 1776, in the same manner as if estates tail could now be made; that is, that notwithstanding the *essential* change in the condition of testators here, we are to decide on their wills, as if made in

England under their statute *de donis*; and that although we are thus not to permit the *absence of power* to make an estate tail, to weigh in the construction of wills, yet, on the other hand, we are not prohibited, either by the statute or our decisions, from looking at the other part of the system, by which *realty and personalty* are put on the same footing, to wit, that part of the statute, by which an absolute estate passes, unless where a less one is limited; and therefore we are to take *that part* of the Act into view, though not the other. Indeed it seems to me even to be insisted on, that we shall construe a will of lands as if the words *to him and his heirs*, wherever they are supplied by the statute, were actually in the will. But the presence or absence of such words in a will of personals, has a great effect on the construction, when inquiring into the *intent*, in relation to the *time* when the contingency is to happen; though it will not affect the *quantity* of the estate given.

If, however, the Acts themselves oblige us to adopt the course of construction insisted on, as it regards one branch of the system, I cannot perceive why they shall not extend to the whole. The law dispensing with words of inheritance, is no more *law afortime*, than that destroying entails. Whether we are to consider that part of the Act of 1785, dispensing with words of inheritance, in connection with this will, is, therefore, the point now to be decided *in the first place*; because, if we are not, but are to consider this will in the same manner *in this respect*, as if it was made before the Act of 1785 went into operation, then the case of *Goodrich v. Harding*, and many other cases in England and here (it seems to me at present), seems sufficient to support this as a good executory devise. The point *now* under consideration, seems purposely to have been left open by at least two of the Judges in that case.

It seems to me at present, then, that if either the Acts themselves, or the decisions of this Court, bind us down to construe wills of lands, independent of the change in our condition wrought by those very laws, that we are bound throughout. The change in placing realty on a level with personalty, as to the power of entailing, was no less important as applicable to *construction* and finding out *intent*, than the change as to words of inheritance; and indeed, to my mind, much more so; and being part of the very same law, if we are inhibited from viewing or weighing the effect of the one, we must be bound also as to the other. There is the same reason, too, for *breaking through* the decisions *in toto*,

as for doing so *in part*. Indeed more so; for, looking at a part only of the system may even lead to greater errors, than shutting our eyes to the whole.

What is the law, and what have been our decisions on this subject? And how far are we to be bound, especially since the Act of 1819, to construe wills in this country as they do wills in England? This, to me, is a momentous question, especially since the Legislative construction by the Act of 1819. Do the Acts themselves of 1776 and 1785 tie us down to decide as if we were sitting in Westminster Hall, judging of a will made in England? It is said (and the idea has met with the approbation of at least some of the Judges of this Court), that the use of the words, *as the law aforesaid was*, in the Act of 1785, as well as the phraseology of the Act of 1776, do so confine us. This idea, I humbly, and with great deference, think is not well founded; and that, therefore, if we have erred in this respect, we cannot impute it to the Legislature; and consequently, if an erroneous supposition that the law imposed this duty on us, has led us into this error, becomes a matter of serious consideration what course we ought to pursue. Were we bound *by law*, as it is said we were and are, to adopt and pursue this course of decision?

This leads to the inquiry, how and for what purpose, these words were introduced into the Act of 1785?

Before the statute *de donis*, all inheritances were estates in fee-simple or fee-conditional. Tenant of lands entailed had before this statute a fee-simple conditional subsequent; and although he had issue, he had not thereby a fee-simple absolute; for, if he afterwards died without issue, the donor could enter in his reverter. 1 Inst. 13. But after issue, he could aliene, so as to bar him; and as well before as after the issue, he could aliene, so as to bar his own issue. The object of the statute *de donis* was to restrain this right of alienation, which operated to the *disherison* of the issue of the donee, and to the exclusion of the donor from the reversion; both of which was contrary to the will of the donor, and against the form of the gift. In carrying this law into effect, the Courts decided that the donee should not have a fee-simple conditional as aforesaid; but they divided the estates, and created a particular estate in the donee, and a reversion in the donor, so that the donee could not, by alienation, bar his issue or the donor as aforesaid. Thus it is, that tenant in tail is said to be by virtue of this statute.

The power of alienation, however, was afterwards given by statute, if made by *fine and recovery*.

The Act of 1776, then, did not repeal the statute *de donis*, but only provided that any person who *now* hath, or *hereafter* may have, an estate in *fee-tail* general or special, etc., shall, from henceforth, etc., *stand seized*, possessed, etc.; *in full and absolute fee-simple*, etc., as if the conveyance had been in fee, etc. The party was not thereby thrown back on his fee conditional at common law, although the statute *de donis* might be said to be *virtually* or *substantially* repealed. It was permitted, as it were, to remain in force, merely for the purpose of enabling *tenant in tail* to hold the *fee absolute* and *unconditional*, under this Act.

The Act of 1785, ch. 62, then takes up the subject, and declares, that "every estate in lands, etc., which, on the 7th of October, 1776, was an estate in fee-tail, shall be deemed from *that time to have been*, and thenceforward to continue to be, an estate in fee-simple; and every estate in land, which *since* hath been limited, or *hereafter shall be* limited, so that, *as the law aforetime was*, such estate would have been an estate tail, shall also be deemed to *have been*, and to continue an estate in fee-simple; and all estates which, before the said 7th day of October, 1776, *by the law if it remained unaltered, would have been estates in fee-tail*, and which now, *by virtue of this Act, are and will be* estates in *fee-simple*, shall from that time and henceforth be discharged of the conditions annexed thereto by the common law *restraining alienations* before the donee shall have issue; so that the donees, or persons in whom the conditional fees *vested* or *shall vest, had and shall have* the same power over the same estates, as if they were *pure* and *absolute fees*." Then follows the clause dispensing with words of inheritance in creating a fee. It is plain to be seen by this latter part of the clause concerning estates tail, that if it had either been suggested, or there was some fear entertained, that the Act of 1776, having virtually abrogated the statute *de donis*, it might be supposed that the common law conditional fee was revived, and stood as before that statute; and the case of *Carter v. Tyler*, 1 Call 165, is perhaps sufficient to show that this idea is not without foundation. The words, therefore, "*as the law aforetime was*," I humbly conceive, had reference to the *fee-tail* as created by that statute, to be adjudged of *as if that statute was in force*. This idea is fortified by the words of this second member of the clause, which

declares, that all estates which, before 1776, "by the law if it *remained unaltered*, would have been an estate *in fee-tail*," etc. What law is supposed here to have been altered? Surely the statute *de donis*, and possibly the common law as to conditional fees. But if they both had not been virtually repealed by the Act of 1776, the Legislature, by this very Act of 1785, did expressly *alter or abrogate them both by this second clause*, so as to make estates which, by the *law afortime*, were either *fee-tail* or *fee-conditional* at the common law, absolute fees. For these reasons, then, those expressions were deemed necessary and proper, and not for the purpose of laying down rules for the interpretation of wills or deeds, or to bind the Court down, in its search after the *intention*, to decisions and reasons, which, by the very Act, were rendered inapplicable. There was not, and could not be, any wish in the Legislature, to create estates in fee-tail, contrary to the will of testators, so as to convert them into fee-simple estates. There never has been any hostility to those limitations for family purposes, which are to take effect within the reasonable time prescribed by law. On the contrary, the Act of 1819 is a complete Legislative declaration, that the course of decision which has so long done violence to the wills of testators, by applying rules of decision here which do not exist in England (for there, where a fee-tail *cannot exist*, their rule is, as I contend it ought to be here), is no part of the Legislative will, but the reverse. Why has the Legislature by that Act said, that a limitation made so and so shall be good, unless it plainly appears that such was not the intention? Was it intended thereby to vest a different estate than was intended by the testator, as is done when an estate tail is converted into a fee? Surely not. It was to restore to wills their real and intended effect; to adopt the construction that no man ought to be supposed as intending to create an estate, which cannot exist by law, unless it manifestly appears that such was the intention.

Suppose a testator should preface his will by stating that he was without counsel, and unacquainted with the technicalities of law, and of Courts; but, that he knew he could not create an estate tail, and also, that a fee would pass if he did so, and he would be thereby defeated in certain provisions which he wished to make for his children and their descendants, for family purposes, and to keep the estate in his family as long as he could, without the violation of any law; and therefore hoped that his will might be fairly construed and supported, unless it *plainly*

appeared that he had attempted to create an estate, which the law did not authorize ; and a will, such as the present, and such as this Court is in the habit of deciding on, so prefaced, was submitted to us to decide what meaning was to be put on it. Could any other be put on it than such as the Act of Assembly of 1819 aforesaid, has prescribed ? But, is not this, in fact, the appeal which every testator, since the Act of 1776 was generally known to be in force, makes to this Court ?

I once heard of a Scotchman who, having acquired a good deal of property, had occasion to leave the country ; but, before doing so, made his will. Not being heard of for a long time, *probate* was taken of the will, supposing him to be dead. After some fifty years, a suit, depending on the construction of the will, was argued and about to be decided. An aged stranger attended the argument and decision ; after which, he arose and told the Court that whatever they might say to the contrary, *when he wrote and made that will*, he intended so and so ; very different from what the Court had decided. Could all the testators, since the Act of 1776, thus appear before us, we would hardly believe this assembled host from the dead, in how many instances their wills had been violated. The *law* then has not prescribed this course of decision.

2. But how far have we bound ourselves, and what have been our decisions on this point ?

As to *positive* decisions, there are two ; *Tate v. Tally*, 3 Call 354, and *Smith v. Chapman*, 1 Hen. & Munf. 240 ; the first decided in 1802, on a will made in 1777 ; the other, on a will made in 1790. The point was made and ably argued in both cases ; Lyons, Fleming, and Roane, being the Judges, with Tucker in addition, in the second.

In *Tate v. Tally*, Judge Roane was inclined to the opinion, that even if we construed wills of lands made since 1776 in the same manner as wills of personals, it would not have been a good limitation of personal property ; but says, “ he will not waste time to inquire as to that, being equally clear that it is quite immaterial whether the will was *prior* to 1776, or since. The Legislative construction of the Act of 1792,” he says, “ accords with my opinion on the subject.” (I presume he means the Act of 1785, as incorporated in the Revised Code of 1792.) “ It is entitled to respect, but would not bind the Court to adopt the same construction, contrary to their own judgment, *in relation to prior cases*,” etc.

Fleming, Judge, says, that “ as well on general principles as on the case of *Hill v. Burrow*, this was an estate tail in Jesse Tate, prior to

the Act of 1776. The question therefore, is, whether its being made subsequent to that Act has altered the case? And I think not; for the whole effect of that statute is, to convert estates tail into estates in fee-simple; and not to alter the meaning of words, or destroy the established rules of construction." Lyons thought it a clear case of an estate tail; but said nothing on the point we are now considering. Nor do I understand Judge Fleming as pretending to say, that the Legislature had tied the Courts down to construe a will of a subject which cannot be entailed, in the same way as of one which can; and this will be entirely manifest by his opinion in *Smith v. Chapman*, 1 Hen. & Munf. 240, in which case, also, Judge Roane shows that his opinion in this case, which is the one usually referred to on this subject, does not contain his *whole* opinion. In *Smith v. Chapman*, he says: "Nothing is gained in favor of *intention*, by construing the limitation to be an estate tail; for it is *eo instanti* converted into a fee-simple by the general law, of which the testator could not have been ignorant," etc. The Act of 1776, he says, "cuts up by the roots the pretence of *implying* an estate tail," etc. In *Tute v. Tally*, he says: "The Court concurred in opinion with the Legislature, that in construing what was or was not an estate tail, we should have reference to former laws, and that as to the construction to be made in relation to that point, we should inquire what the *law aforesaid* (that is, before 1776) was," etc. "In a case, however, where the *intention* of a testator is alleged, under pretext of *providing for his issue*, but in reality to *infer* an estate which will *defeat* them, it would seem proper to rebut that allegation by resorting to a *posterior general law*, without an ignorance of which, it is impossible that any such *intention* could have existed." This part of the opinion gives me almost everything I contend for. The *absence* of a power to entail lands, according to it, is a circumstance to be weighed in this Court, when you are called on to *infer* an estate tail; which therefore, you ought not to do, if you can fairly avoid it, as you thereby gain nothing in favor of *intention*. You can only *create*, in order, *eo instanti*, to destroy it.

Judge Fleming says: "It appears strange to me, that so much pains have been taken to prove that the devise gave, by *implication*, an estate tail, which is now, and at the time of making the will had long been, unknown to our laws, that it might be magically turned into an estate in fee, in order to *frustrate* and *defeat* the plain intent of the will of the testator."

Judge Lyons said : " I shall make short work of all questions arising on the construction of wills made since the Act of 1776 ; so far at least, as it may be necessary to decide whether they meant to pass a fee-tail or not. I will not suppose, after that Act, that a man intended to convey an estate tail (which the law has expressly abolished), *unless plain and unequivocal words are used*, such as would, of themselves, create a fee-tail, as a devise to A. and the heirs of his body, or to A. and if he die without issue," etc.

Judge Tucker, who also sat in this case, said nothing particularly on this point, and it is therefore presumable that he assented to the doctrines contended for ; especially as in parts of his opinion he strongly enforces the duty of searching out and obeying the will of the testator, when that can be done ; and as he also concurred with the other Judges on the main question.

It cannot, therefore, be maintained, that so far as a decision of this naked question goes, it has at all been decided by this Court, not to take into consideration the *inability* to entail land as well as personalty, in searching for *intent*. On the contrary, I consider this a full and decisive case of the question, according with my opinion on that subject.

Has this case been overruled ? It may be said that it has ; because, in many cases, we have recognized the British doctrines, whereby a difference is made between real and personal estate, in a search after intention. Admit this to be the case ; what then is the result ? Here is one course of decision which accords even with the British decisions themselves, that where a subject cannot be entailed, you are not to construe a will as you would in relation to a subject that can be entailed. This course of decision accords also with the common sense of all mankind, and is expressly recognized and made a *rule of property* in future, by the Legislature. Here is also another course of decision by the same Court, running counter to all this ; having, as I conceive, a mistaken interpretation of the Legislative will for its basis, and concerning which all that can be said is, *stare decisis*. It is now a canon of property, and if departed from, great mischief will be done. Sales have been made, titles will be broken, etc., etc. ; so that a man who has purchased from me, who, according to our decisions, had a fee-tail, will lose the benefit of his purchase, and future dealers will not know how to contract. We must, therefore, continue to take estates from the real owners, and give them to such dealers.

As to the first class, there are few cases (unless indeed where a plain

estate tail is given, and which, under the Act of 1819, may or may not be a safe subject of sale, according to circumstances), in which there is not considerable doubt what will be the ultimate construction; so that most purchases of this kind are known to be hazardous; and purchasers ought also to know, that our decisions, as to this leading ground of construction, have been always questioned, and decided different ways. But, is it better to persist in error for the benefit of such purchasers, or to retrace our steps? Suppose the course of decision, now indicated by the Legislature, had taken place soon after 1787; or had been considered as settled by the case of *Smith v. Chapman*, as it ought to have been, and persevered in since; could any one have complained? So far from it, that the Act of 1819 would have been unnecessary. As to future purchasers, they would have been as much admonished by our decision as by that Act, and would govern themselves accordingly.

But, if the Legislature meant to adopt British constructions on this subject, what class of cases have they adopted; those which relate to subjects that can be entailed, and therefore may be presumed to be so intended; or those which relate to subjects that cannot be entailed, and concerning which the presumption fails? Have they adopted rules of construction drawn from cases strictly analogous, or the reverse? One is as much *law afortime* as the other. Whatever doubts may have existed, and however we may have settled this matter, the Legislature, the whole people speaking through them, have said, that the correct rule of decision is not that which has heretofore been pursued, but the reverse. It is no longer a question, which is the *right*, and which is the *wrong* rule of construction. That is decided, and has become a rule of property, by law.

The only question now remaining for us to consider, is, whether we can now throw off the *wrong*, and take up the *right* rule? If we cannot go back, cannot now reassert and establish the doctrines laid down in *Smith v. Chapman*, how can we justify a partial departure from our course of decision, by looking to the Act dispensing with words of inheritance? Judge Roane, who laid down the rule, and is most likely to have known its extent, in *Tidball v. Lupton*, 1 Rand. 203, speaking even of the Act of descents, says: "We are not at liberty to refer to it; we are confined in our construction, both by the Acts of 1776 and 1785, and by the decisions upon them. All these have referred to the *lex temporis*, and adopted it," etc. If we break through the decisions,

then, because it is *reasonable to do so*, as to this matter, do we not shake the *foundation* of those decisions, and must they not fall at the next touch? I think so; and therefore, if I touch the foundation at all, which I must do if I depart from them in any respect, because it is *reasonable* that I should do so (as I think it is in this case), then I am at once for saying that *Smith v. Chapman* gives the law of the land on this subject. I think the necessity of departing from those decisions, in regard to the application of this part of the Act of 1785 to the case, as well as the clear Legislative enunciation of the correct rule on this question, gives an *opportunity*, and indeed *call*, for an examination of our course on this subject, and it will be our own fault if we shall hereafter be reduced to the dilemma of deciding, that a testator who made his will *on the day before* the Act of 1819 was enacted, using the same words with one made *on that day*, nevertheless intended *precisely the reverse* of what the latter testator did.

But, it may be said, if all this is granted, if this was personal estate, the limitation over would not be good; for the remainder-man will take in fee, under the Act of 1785; and there is, therefore, nothing to *tie it down* to a dying without issue living at the death of the first taker. We must, however, recollect, that now there is equally an *absence of power* to entail lands, as personals, and therefore, it equally conflicts with intention to *infer* that one was intended; and that the *absence* or *presence* of words of inheritance are equally unimportant, both in case of lands and personals, as to the *quantity* of estate really given, whilst their *presence* or *absence* equally tend to show what the testator had in view, as to the *time* when a contingent event was to happen.

Compare this case, then, with that of *Dunn v. Bray*, 1 Call 338, above mentioned. That was a devise of negroes to W. B. and his heirs *forever*; but, in case he should die and *leave no issue*, then to C. and his heirs. This was held to mean a dying without issue living at the death of the devisee. It was admitted by Judge Pendleton, that if it had been an estate tail in W. B. as was contended, the remainder would be void; since in that case, it would be to take effect on a general failure of issue. He then goes on to repel the idea of an entail, in the manner I have before shown, and says, that Lord Talbot, in *Atkinson v. Hutcheson*, 3 P. Wms. 258, fully illustrates the distinction between the devise of an *express estate tail* and one by *implication*, as well as the *natural meaning* of the words, "*dying without issue*," to wit, *at the time of the death*.

It is true, that in the case before us, there is neither the word "leave," nor the word "then;" but the devise over in that case was to C. *and his heirs*, which is wanting in this case; and here, it is to be divided among the *surviving brothers, children* of the *last* wife, excluding the children of brothers that may have died; which shows, in fact, that it was a dying *without issue*, living some one or more of the brothers, who would take as *survivors*. This view of the case will even bring it within that of *Pells v. Brown*, Cro. Jac. 590; for if P. Bell had left issue at his death, and brothers also surviving, they never would have taken, although that issue had become extinct before their deaths. This would also bring it within the cases of *Porter v. Bradley*, 3 Term Rep. 143, and *Roe v. Jeffery*, 7 Term Rep. 589.

What is the principle of these cases? There is, say, a devise to A. *and his heirs*, but if he die without *heirs*, then to B. the brother of A. Now here, *to die without heirs* does not mean *without heirs generally*; because B. who was to take after A. would be his *general* heir, if there was none nearer. The use of the word *heirs*, therefore, meant the same in both instances in which that word was used, to wit, *heirs of the body*. This, it has always been said, is a mere matter of construction; and in such a devise, has always been so construed, as will be seen by the cases cited in *Pells v. Brown*, and other cases. So that, in that case, it would stand as if the devise had been to A. *and the heirs of his body*, and in case he should die *without such heirs*, etc. This would make it, as it were, an express estate tail. But very different, as Lord Kenyon says, is the case of a devise to A. *and his heirs*, and if he die *without leaving heirs of his body*, then to B. and his heirs. Here is an express fee; and it is not necessary to cut it down to an estate tail, with any view to the issue, for a fee also provides for them. An intention to cut it down must, therefore, manifestly appear, as I understand the authorities, even in England; because, here is a remainder-man who is evidently an object, as well as the issue. Had the first estate been for life, then, as the issue is the primary object, the estate must be enlarged to an estate tail, or that intent would be defeated; and therefore, the remainder-man must yield to the issue, as in *Tate v. Tally*, 3 Call 354. But, when the issue are provided for by the fee in the ancestor, and the remainder-man is also an object, which object must be defeated if you provide for the issue, otherwise than at first contemplated, viz.: by changing the fee into an estate tail, you must have full warrant for so

doing ; that is to say, you must clearly see that an indefinite failure of issue was intended. If so, then, inasmuch as it now clearly appears that the *intention* was to provide for the issue, not by a fee in the ancestor, but as *issue in tail*, then the will is to be again construed, as if it had in the first instance been a devise to A. *and the heirs of his body*, and if he die without heirs of his body, etc. ; that appearing now to be the meaning in which the word *heirs* was at first used.

But, if the subject of the devise be one of which an estate tail cannot be made, then it will require clear proof indeed, that it was intended to provide for the issue, *as issue in tail*, which they could not be ; for, to give it this shape, is not done in order to *give them anything*, and thereby advance the intent ; they get nothing by it. The only effect is, to show that the testator *ignorantly* created an estate which could not exist in law ; and in consequence of which, his intentions in favor of the remainder-man are defeated. But, having done this, in such plain terms that no other construction can fairly be put on his words, the Court is forced, by the rules of law, to defeat his intention.

But a limitation over to *survivors*, as well as the absence or presence of words of inheritance, though otherwise of no avail, as before said, have affected *the construction*, in many cases.

In *Brewer v. Opie*, 1 Call 214, the testator gave his *whole and sole* estate, real and personal, to his son, I. L., and in case he should die before twenty-one, or lawful heir, *then* his *estate* to be *equally divided* between the children of I. B. and L. O. It was held, that I. L. took a contingent fee (though there were no express words of inheritance), to become absolute upon either event happening ; and as his dying must determine both events, the remainder was good as an executory devise. He died without issue, and under twenty-one years.

Timberlake v. Graves, 6 Munf. 174 ; *Gresham v. Gresham*, Id. 187, on a will dated in 1803 ; *James v. M'Williams and Wife*, Id. 301, and *Cordle v. Cordle*, Id. 455, on a will dated in 1805 (the Reporter does not give the dates of the wills in the other cases), are all cases of this description.

On the whole, I incline to think, that the limitation over in this case was good as an executory devise.

Judge CABELL concurred with Judges CARR and GREEN, and the judgment was affirmed.

According to Mr. Smith, the term executory devise has a generic sense, which includes contingent remainders as well as other future interests "limited to arise and vest upon some future contingency; comprising, in fact, all limitations of executory interests by way of devise." "But," adds the learned author, "the term is almost invariably used in a narrower sense in contradistinction as well to contingent remainders as to immediate devises, so as to denote 'such limitations of a future interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law,'" Smith, *Ex'y Devis.*, § 111 a. The definition quoted is from FEARNE, *Cont. Rem.*, p. 386.

Blackstone defines an executory devise of lands as such a disposition of them by will, that thereby no estate vests at the death of the testator, but only on some future contingency, *Blackst. Com.*, Lib. 2, p. 172. The inaccuracy of this definition is shown by Blackstone himself, for he immediately goes on to state wherein the executory devise differs from a remainder, while the definition itself would certainly cover a contingent remainder made by will; for the devise of a contingent remainder vests nothing in the remainderman on the death of the testator, but his estate must arise on the happening of some contingency. If, however, it be said that a remainder, whether vested or contingent, must be supported by a precedent estate, and that, therefore, in the case of a remainder an estate is vested on the death of the testator, though not in the remainderman, and that the terms executory devise and devise, in the sense which includes a remainder, must be viewed in their entirety, and not with reference to the future or executory parts only; then, again, the definition is defective; for, in the case of an executory devise so viewed, we may well have an estate vested immediately, though subject to destruction or divestiture by the coming into existence of the executory estate.

The definition of FEARNE is adopted by Mr. Thomas in his note C to COKE upon LITTLETON, 112 b; and, while it is a very good one, yet the definition of CHANCELLOR KENT—"An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law," 4 *Kent's Com.* 264—seems preferable not only on account of its superior simplicity, but because it limits the term devise to that species of property to which it more properly belongs, viz., land.

Origin of Executory Devises.

The origin of executory devises is to be found in the indulgence shown by the law to the desires of a testator. As said by CARR, J., in *Bells v.*

Gillespie, 5 Rand. 273: "Executory devises are a mere indulgence granted to men's wills, lest the intention of the testator should be wholly defeated, and are only resorted to when the limitation can in no other way be sustained."

According to Sir Orlando Bridgman, executory devises are grounded upon the common law, see *Bate v. Amherst*, Thos. Raym. 82, referring to *Goodcheap's Case*, as cited in *Lord Stafford's Case*, 8 Co. 76; and Mr. Hargreaves in his argument in *Thellusson v. Woodford*, 4 Ves. 249, notices the opinions of other judges to the same effect, and mentions some cases of date prior to the Statute of Uses, but suggests that, at least, some of them might be accounted for as having been based on powers of devise given by custom. The better opinion, however, seems to be that this species of limitation may be considered as having arisen, or, at least, as having grown to vigor, since enactment of the Statutes of Uses and Wills, see Williams, Real Prop. 312. It grew slowly into use, and was viewed at first with considerable distrust as a means of the possible revival of perpetuities; but by the time of the case of *Pells v. Brown*, Cro. Jac. 590 (18 Jas. I.), executory devises seem to have been fully established and recognized, at least to the extent of permitting a limitation upon a contingency to be so made that the executor's estate might not vest for a period not exceeding one life, and to have been by that time protected from destruction by means of a common recovery. Since that time the law relating to executory devises has been greatly developed, which development is traced by Mr. Hargreaves in the argument above referred to.

We shall consider, first, the main characteristics by which executory devises are to be distinguished from remainders; second, their limitation and the rules by which they are restrained; and lastly, their properties and incidents other than those indicated above.

Characteristics of Executory Devises.

The distinguishing characteristics may be said to be six in number, as follows:

First, By an executory devise a future estate may be created without being dependent upon or supported by any precedent particular estate, and, even if of freehold, may commence *in futuro*, 2 Blacks. Com. 173; *Beard v. Rowan*, 1 M'Lean 135, S. C. on error, 9 Peters 301; *Dallam v. Dallam's Lessee*, 7 H. & J. 237; *Lessee of Thompson v. Hoop*, 6 Oh. St. 480; *Mangum v. Piester*, 16 So. Car. 317. In the case first cited, the devise was of certain land in fee to one Allen Campbell, if within a certain time he should become a citizen of the United States, or be otherwise qualified by law to take and hold real estate. This was held to be a good executory devise.

Second. By an executory devise a fee or other estate may be limited after a fee, *Booker v. Booker*, 5 Humph. 505; *Hawley v. Northampton*, 8 Mass. 3; *McRae's Adm'r v. Means*, 34 Ala. 349; *Isbell v. Maclin*, 24 Id. 315; *Mangum v. Piester*, 16 So. Car. 317.

Third. By an executory devise an estate may be limited upon an event the occurrence of which will work the destruction of a prior estate, *Langley v. Heald*, 7 W. & S. 96; *McRae's Adm'r v. Means*, 34 Ala. 349; *Isbell v. Maclin*, 24 Id. 315; and see *Lessee of Thompson v. Hoop*, 6 Oh. St. 480.

Fourth. By an executory devise a term for years may be limited of a chattel interest, the term to arise after the determination of a particular life estate created in the same, Blackst. Com., Lib. 2, p. 173.

Fifth. An executory devise is not barrable by any act of the first taker of the land devised, even if he resort to a common recovery, *Fearne Cont. Rem.* 416; 4 Kent's Com. 270. See this subject more fully treated *post*, p. 520.

Sixth. An executory devise is only admissible in wills. While this is strictly true, it is to be noted that by the Revised Statutes of New York, and the States in which they have been followed, a species of future estate has been created which in every respect, except that it is created by deed, is an executory devise possessing all the characteristics and immunities of the last named interest. In Virginia it is expressly declared that any estate which would be good as an executory devise shall be held good if created by deed, Code (1873), Ch. 112, § 5, p. 888; and so in West Virginia, Rev. St. (1879), Ch. 82, § 5, p. 551. And see also Texas, Rev. St. (1879), Tit. XIX., Art. 556, p. 93.

Classification of Executory Devises.

The generally adopted classification of executory devises is into two kinds which relate to realty, and one which relates to personalty, with which latter, except so far as it has reference to chattels real, we are not in this note concerned.

This division, which is the one given by *Fearne* and derived by him from *POWELL, J.*, in *Scatterwood v. Edge*, 1 Salk. 229, is as follows:

First. Where the devisor departs with the whole fee-simple, but, upon some contingency, qualifies that disposition and limits an estate on that contingency.

Second. Where the devisor does not depart with the immediate fee, but permits it to descend to his heir, and on the happening of a future event devises it to another person.

The *third*, comprising all executory devises which relate to chattels, is

where a term for years, or any personal estate, is devised (more properly bequeathed) to one for life or otherwise, and after the decease of the devisee or legatee for life, or on some other contingency or at some other period is given over to another person, Fearné Cont. Rem: 399–401 and notes *d* and *e*.

Mr. Preston makes a much more elaborate division. His division is as follows:—As to estates of freehold:

First. Where the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition and limits an estate upon that contingency.

Second. Where the testator gives a future interest of freehold, to arise either on a contingency or at a time certain, but does not depart with the fee at present or limit any immediate freehold.

Third. Where the testator gives a future interest of freehold, to take effect in possession after and in subordination to a particular estate of freehold, but the estate of freehold must necessarily determine before the remote interest can come into its place, thus leaving an intermediate space between the actual determination of the first estate and the commencement of the subsequent estate.

Fourth. Where a particular estate, as distinguished from the fee, either with or without a disposition of the fee, is given by will and there is a devise in the same will to take effect in derogation and abridgment of that estate before the period of its regular and proper continuance is accomplished, or where an estate tail or an estate for life is limited to one person, and on a prescribed event that estate is to cease and be defeated and another is to arise, or a remainder is to be accelerated and take its place.

Fifth. Where an estate tail or an estate in fee is on some event reduced to an estate for life.

Sixth. Where there is a devise of an estate of inheritance or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial, though not total, exclusion of the same.

Executory bequests of chattel interests and other personalty are by Mr. Preston divided as follows:

First. Where a term of years or any personal estate is devised to one for life with a limitation over, improperly called a remainder.

Second. Where there is a complete disposition of the term or property, and there is a substitution of another person to take in some event which is to defeat or abridge the former gift.

Third. Where there is a substantive and independent bequest to wait for its effect until the death of a life or lives in being, or until the happening of a contingency in some manner connected with that event simply, or that event attended with a failure of issue at that time or any given period.

In *Richardson v. Noyes*, 2 Mass. 56, SEDGWICK, J., classified executory devises as follows: "Executory devises, as they respect estates of inheritance, are of two kinds: 1. A substitution of one fee for another which fails. 2. Of a fee to commence at a future time without the support of a particular estate." The division of Fearné is the one which is generally adopted; see *Nightingale v. Burrell*, 15 Pick. 104; 2 Washburn R. P. 683; and but little notice is found of Mr. Preston's classification in the American authorities. In the case of *Doe ex d. Harrington v. Dill*, 1 Houst. 398, a strenuous effort was made before the Court of Errors and Appeals of Delaware to establish a case under Mr. Preston's sixth class. In that case the testator, by his will, devised to his sons Nathaniel and Robert a tract of land, with the provision that if either or both of them should die leaving no lawful heirs of the body who should arrive at twenty-one years of age, the subject of the devise should go "to the remainder of my sons then living." By another clause of the will he devised to another son, William, a tract of land upon payment of a certain sum to a grandson on his arrival at full age, with the same devise over as in the case of the first mentioned tract, and by other clauses the testator devised to Isaac, a son, and to Samuel and Henry, sons, certain tracts in each case, with devises over "to the remainder of my sons then living," under the same circumstances as those recited in the first devise over. The residuary clause of the will directed the balance of the estate to be divided "as the law directs." The testator, on his death, left surviving him all the sons mentioned in the will, and also two daughters, both married, and two grandchildren, issue of deceased children of the testator. In 1853 all the sons, except Samuel, had died, and all of them, except Nathaniel, without issue, whereby the interest of all had, under the terms of the will, become vested in Nathaniel and Samuel, and the interest of the former had become vested by other means in Samuel. In 1854 Samuel died. At the time of action brought, the contest was between the plaintiffs, who claimed as heirs at law of the testator, and the defendants, who claimed as heirs at law of Samuel.

In the course of a learned opinion, HARRINGTON, Ch., said: "The plaintiffs contend that the first estate though in fee, being but a defeasible fee, as all agree it is under each of these devises, it was defeated by the happening of the contingency provided for, namely, the taking effect of the devises over, though but for life, and being once defeated it was destroyed, and that the ultimate interest passed under the twelfth item of the will as a residuary devise to the heirs generally of the testator, and did not revert to the heirs of the first devisees in fee conditional. For the defendants, on the contrary, it was contended that on the taking effect of the devises over for life the preceding devises in fee were not absolutely

defeated or destroyed, but were only impaired or abridged *pro tanto*, and on the determination of the life estates the premises reverted to those interested in the previous devises in fee-simple, and passed to their heirs at law.

"This idea appears to have originated with Mr. Preston, . . . saying: 'That there is a sixth species of executory devise of real property may be concluded from general principles, and it may be defined to be where there is a devise of an estate of inheritance or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same,' 2 Preston Est. 140. Powell . . . approves of the principle suggested by Mr. Preston, but denies that it has any foundation in any adjudged case, and admits that it introduces a new qualification to the position long before laid down by Mr. Fearne, 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only and leave it good for the remainder,'" Fearne's Essay 251, 530. After remarking that the defendants assumed the fact upon which their position was based, the learned Chancellor continued: "But that is just the point in issue, whether these devises are in derogation of the estate of inheritance to a partial and not a total exclusion of the same. The contingencies to which the estates of inheritance in these cases were subjected, and which rendered them defeasible fees, may with more propriety be said upon the happening to defeat the estates in fee, and to be in total exclusion of the same. Neither can it be assumed in these cases what Mr. Preston's definition requires to be assumed, that the estates limited over were merely to a partial and not to a total exclusion of the original devises in fee; for though the estates limited over be but estates for life, the residuary item of the will provides for their further and final limitation and the disposition of the ultimate interest in the premises if the defeasible estates of the first devisees be defeated by the happening of the contingency to which they were made subject, and under which clause of the will in these events the ultimate interest in the premises on the expiration of the life estates would pass to the residuary devisees of the testator. The contrary doctrine, that such a limitation is only a partial and not a total defeasance of such a conditional and defeasible fee, is not only contrary to the principle as stated by Mr. Fearne, which says that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only and leave it good for the remainder, but is against the current of all the authorities and writers on the subject, who regard such a limitation to a fee as a condition and defeasance which, if it happens, defeats the estate

in toto to which it is annexed. The first devisee takes the fee only subject to the condition, and the ultimate estate or ulterior interest reverts to the devisor on the happening of the condition or contingency which defeats the estate given to him, and which is itself then consumed by virtue of its own limitation."

With the Chancellor, MILLIGAN and HOUSTON, JJ., concurred. GILPIN, C. J., and WOOTEN, J., dissented from the opinion of the Court, being of opinion that the executory devises were in derogation of the first granted fees *pro tanto* only.

Limitation will not be Held an Executory Devise which Consistently with Phraseology of Will can be Held to give a Remainder.

Executory devises are not favored in law on account of their tendency to prevent the exercise of that absolute control of property which it is the policy of the law to vest at the earliest possible moment, and it is laid down as a general rule that a devise will never be interpreted as an executory devise where it may in any way consistent with the phraseology of the will be interpreted as a contingent remainder, *Willis v. Bucher*, 3 Wash. C. C. 369; *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrell*, 15 Pick. 104; *Parker v. Parker*, 5 Metc. 134; *Terry v. Briggs*, 12 Id. 17; *Hall v. Priest*, 6 Gray 18; *Stehman v. Stehman*, 1 Watts 466; *Manderson v. Lukens*, 23 Pa. St. 31; *Johnson v. Valentine*, 4 Sand. 36; *Hoxton v. Archer*, 3 G. & J. 199; and see cases cited on page 283.

But Intent of Testator may make that an Executory Devise which is *prima facie* an Estate on Condition.

But in the interest of the testator's intention an executory devise may be held to be created by language which, at first sight, would seem to make an estate on condition; thus in *Burfoot v. Burfoots*, 2 Leigh 119, the devise was to certain grandsons of the testator, "each holding his part in fee-simple, upon condition that each shall have issue of his body lawfully begotten; but if either of my grandsons should die leaving no such issue, then his share shall pass to the surviving grandson, and such survivor shall hold and enjoy in fee-simple the whole estate given to both, upon condition that the surviving grandson shall, at the time of his death, leave issue of his body lawfully begotten; but if both my grandsons shall depart this life neither of them leaving such issue as aforesaid, then" the land to go over. It was held that the words "upon condition," etc., did not create a condi-

tion, since by so interpreting them the testator's intent would manifestly be defeated. And see *Mathias v. Hammond*, 6 Rich. Eq. 121.

Alternative Limitation may be Read in one Event an Executory Devise and in another a Contingent Remainder.

And in favor of the intent of a testator an alternative limitation may be so read that in the case of the happening of a given contingency it will be held a contingent remainder, and in the case of its non-happening an executory devise. See *Wells v. Ritter*, 3 Whart. 208.

Executory Devise not Raised in Case of Remainder which becomes Void or Fails.

But where the testator's intent has been evidently to create a remainder, and by subsequent legislation that intent becomes impossible to be carried out, the Court will not construe the remainder an executory devise in order to accomplish what probably would have been the testator's desire had he contemplated the altered state of the law; for the law, while indulgent to his intent, so far as it can be gathered from his expressions, will not, by a species of *cy pres* construction, attribute to him an intent which he never attempted to express and could not even have had. An example of this is found in *Carter v. Tyler*, 1 Call 165; in that case a will was made giving a remainder after an estate tail; the Act of 1776 was afterwards passed, by which estates tail were converted into fees-simple; the Court was urged to construe the limitation over as an executory devise; it, however, refused to do so, PENDLETON, P., in delivering the opinion of the Court, saying: "If this devise, which is a contingent remainder, and as such barred by the Act, could be converted into an executory devise for some purposes, yet it cannot be so changed to avoid the Act nor have that effect."

More Liberal Rule in Ohio.

But in Ohio a more liberal rule has prevailed; and where by a will a limitation falling strictly within the definition of a contingent remainder has been carved out of an estate and has been defeated as a remainder by the lapse of the preceding estates, it has been construed to be an executory devise, and upheld as such in order to carry into effect the testator's intent, *Lessee of Thompson v. Hoop*, 6 Oh. St. 480.

Presumable Intent of Testator in Case of Unforeseen Contingency not Regarded.

And it is also to be noted that where a testator has provided for a contingency, and before the taking effect of the executory devise another contingency happens, the courts will not so construe the language of the will as to provide for what would presumably have been the testator's intent had he foreseen the second contingency. Thus in *Duryea v. Duryea*, 85 Ill. 41, there was a devise to G. W. B. and E. A. D., children of the testator, with the provision that should either of them die before the testator the children of the one so dying should take his share, and should either depart this life leaving no issue him or her surviving, the share of the one so dying should go to and belong to the survivor, his heirs, etc. E. A. D. died before the testator, leaving children; G. W. B. died after the testator, unmarried. The Court held that there was no devise over of the share of G. W. B.; and that the Court would not, for the purpose of making one, read "survivor" "other." And see also *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

Devise Over after Devise of Part of a Fee-Simple not an Executory Devise.

Where an estate is limited over after a devise of part and not the whole of a fee-simple, the devise will be held to make a contingent remainder and not an executory devise, *Hawley v. Northampton*, 8 Mass. 3.

Events upon which Executory Devise may Take Effect.

The event upon which an executory devise may be made to take effect, is as wide in its scope as in the case of a contingent remainder. A very common limitation over is upon the failure of issue of the first taker. Limitations of this kind will be found treated further on. The event upon which the devise over is to take effect, may be the attainment of a certain age by a certain person, whether he be the devisee or not, provided the attainment of age fall within the period of perpetuities. Thus a devise to a grandchild from and immediately after the youngest grandchild named in the will shall attain the age of twenty-one is a good executory devise, *In the Matter of Sanders*, 4 Paige 293; so also is a devise over on the death of a person before reaching certain age, *Barnitz's Lessee v. Casey*, 7 Cranch 456; *Doebler's Appeal*, 64 Pa. St. 9; *Fowler v. Depau*, 26 Barb. 224.

Devise Over on Death of First Taker before Certain Age and Without Issue—"Or" read "and."

It may here be noted that a very frequent form of executory devise over is upon the contingency of the death of the first devisee under the age of twenty-one and without issue, and that where the expression is if he shall die under age or without issue, the tendency of the courts is to construe "or" "and"; thus in *Doebler's Appeal*, 64 Pa. St. 9, the devise ran: "It is my will and I hereby devise that should my son [the first devisee] die without heirs or before he becomes twenty-two years old, that all my property shall be disposed of as follows: one-half to my sisters or their heirs after them, one-half to St. Paul's church." The Court read the word "or" "and," SHARSWOOD, J., saying: "It is abundantly clear, both upon reason and authority, that the clause must be construed as if the conjunctive word 'and' were substituted for the disjunctive 'or' in the sentence. Upon reason, because if it is construed disjunctively the devisee, the testator's son, who was the first object of his bounty, might die under twenty-two leaving children, and those children would then be deprived of the estate. This is the literal and grammatical construction of the words as they stand. But this, most assuredly, the testator never intended. Upon authority, for the courts have uniformly in wills containing exactly the same language construed the word 'or' to mean 'and.' The English books are full of cases, but we need not look beyond the decisions in this State." In *Jackson ex d. Burhans v. Blanshan*, 6 Johns. 54, the Supreme Court of New York decided the same question in the same way, KENT, C. J., in delivering the opinion, giving a very full and complete history of the English decisions with reference thereto. And see *Hauer's Lessee v. Sheetz*, 2 Binn. 532, reversing 3 Yeates 205; *Holmes v. Lessee of Holmes*, 5 Binn. 252; *Scott v. Price*, 2 S. & R. 59; *Beltzhoover v. Costen*, 7 Pa. St. 13; *Welsh v. Elliott*, 13 S. & R. 205; *Kelso v. Dickey*, 7 W. & S. 279; *Neal v. Cosden*, 34 Md. 421; *Kindig v. Smith*, 39 Ill. 301; *Watkins v. Sears*, 3 Gill. 492; *Den ex d. Abrahams v. English*, 2 Harrison 281; *Dickenson v. Jordan*, 1 Murph. 380; *Turner v. Whitted*, 2 Hawks 613.

When Devise Over on Failure of Issue will be Held Executory Devise.

Considerable difficulty is sometimes experienced, when the devise over is upon the death of the first devisee in fee without issue, in determining whether the future estate is a contingent remainder or an executory devise. In *Nightingale v. Burrell*, 15 Pick. 104, SHAW, C. J., laid down the rule for distinguishing between them as follows: "If the implication from such

description of the contingency taken together is that in the event described it was the intention and expectancy of the testator that the issue should take in succession, then the fee first created is reduced to an estate tail; the tenant in tail may suffer a recovery and bar all remainders, and the gift over cannot take effect as an executory devise, both because it may take effect as a contingent remainder and because it might not vest within the time limited for the vesting of the estate under an executory devise. But if properly described, the event of a person's dying without issue surviving or not is a contingency upon which an executory devise may be limited over as well as the happening of any other event. . . . If, therefore, the description of the contingency is such as not to raise any implication that it is the intent of the testator that the issue are to take the estate as children and heirs of the parent, then the estate limited over is a good executory devise, and the first devisee has an estate in fee determinable upon the happening of the contingency, but otherwise absolute."

Executory Devise Dependable on Performance of Act by Devisee.

An executory devise may depend on the performance by the devisee of an act which is to entitle him to the land devised. Thus in *Chambers v. Wilson*, 2 Watts 495, there was a devise "To any one of my brothers' or sisters' children that shall or may come from Ireland first . . . if so be, they shall or do come within the term of six years after they get lawful word hereof by writing; if none shall come then over." This was held an executory devise to the first niece or nephew who should comply with the will of the testator.

Executory Devise Dependable on Acquirement of Qualification to Hold Land—on Success of Litigation.

An executory devise may depend upon the acquirement by the devisee of a qualification to hold land, *Beard v. Rowan*, 1 McL. 135, S. C. 9 Peters 309; and one has been made to depend upon the success or non-success of the devisee in litigation in which he was engaged, *Morton v. Funk*, 6 Pa. St. 483.

Restrictions on Creation of Executory Devises.

While great freedom is allowed in the creation of executory devises and in the selection of the contingency upon which the devise over is to take effect, there are two rules which place restrictions upon the creation of such executory estates, as follows:

1. An executory devise cannot take effect where there is a precedent estate devised and the *absolute* power of disposition of the land is vested in the first devisee, *Flinn v. Davis*, 18 Ala. 132; *McRee's Adm'r v. Means*, 34 Id. 363; *Hall v. Robinson*, 3 Jones' Eq. 348; *Stones v. Maney*, 3 Tenn. Ch. 731; *Ramsdell v. Ramsdell*, 21 Me. 288; *Cook v. Walker*, 15 Ga. 457; *Burbank v. Whitney*, 24 Pick. 146; *Id. v. Id.*, 5 Mass. 500; *Jackson ex d. Bush v. Coleman*, 2 Johns. 391; *Jackson ex d. Brewster v. Bull*, 10 Id. 19; *Jackson ex d. Livingston v. Robins*, 16 Id. 586; *Pickering v. Langdon*, 22 Me. 413; *Moore v. Sanders*, 15 So. Car. 440; *Wead v. Gray*, 78 Mo. 59; *Alden v. Johnson* (Supreme Court of Iowa), 19 N. W. Rep. 696.

2. An executory devise must not violate the rule against perpetuities, or, in other words, must not be founded upon a contingency which is too remote.

Executory Devise cannot Take Effect after a Devise of Absolute Power of Disposition.

The first rule, although it is sometimes expressed that after an absolute fee-simple there can be no devise over, *Eaton v. Straw*, 18 N. H. 320, must be carefully distinguished from the prohibition of a limitation of a fee or other estate upon a fee which applies in cases of contingent remainders, for, as we have seen, one of the main and most important characteristics of an executory devise is that by it a fee-simple or other estate may be limited after a defeasible fee, and, therefore, there is nothing to prevent the limitation of a fee and a devise over after it, or to prevent the first taker from disposing of his fee-simple subject to the possibility of its divestiture on the happening of the contingency upon which it is to be defeated. The absolute power of disposition which avoids the executory devise must be one which permits the first taker of the fee to dispose absolutely of the very subject of both the executed and executory devise, the land itself, including the interest given by the devise over. As said by WALKER, C. J., in *McRee's Adm'r v. Means*, 34 Ala. 360: "What is meant by the absolute power of disposition which defeats an executory devise can best be ascertained by referring to the reason upon which the principle is founded. One of the distinguishing properties of an executory devise is its indestructibility and its total exemption from the power and control of the first taker, *Fearne on Rem.* 418, 419, 420; 4 *Kent's Com.* 297. As a consequence of this characteristic of executory devises, when the testator's intention to place the limitation over under the power of disposition of the first taker appears, the executory devise is gone. The absolute power of disposal which defeats the limitation over is a power to destroy it by alien-

ation, and not merely a power to alien the estate vested in the first taker. . . . The citation of these cases, and the reasoning upon which they proceed, are abundantly sufficient to show that the absolute power of disposal in the first taker, to which a limitation over is void for repugnancy, is a power to dispose of the whole estate, including the limitation over and in destruction of the limitation. Such power of disposition seems to be called absolute in contradistinction to the power of disposing of a limited fee vested in the first taker. The power of alienation incident to the vesting of a fee in the first taker is not inconsistent with the limitation over; for as the limitation over may take effect in defeasance of the fee, so it may of an estate conveyed under his power of alienation."

Question of Absolute Control Determined by the Limitation not by the Event.

Before proceeding to consider the cases in which the power of disposition under consideration by the Court has been held to be absolute within the terms and meaning of the rule, and those in which it has been held not to be absolute within the rule, it is to be noted that the validity of the devise over is not to be determined by the event, or by the exercise or non-exercise of the power, but by the nature and character of the power itself; if the first taker has an unlimited and absolute power to dispose of the entire fee, free from any liability to defeat, then whether he choose to exercise it or not, the limitation over becomes void, for its existence is incompatible with the absolute control vested by the law in the first taker, and the right or interest of the executory devisee, in the face of the power of the first taker, is too vague, doubtful, and uncertain to be recognized or entitled to any protection by the law.

The case of *Barnet v. Deturk*, 43 Pa. St. 92, which at first sight may seem to look to the event (see the syllabus of the case as stated in *Brightly's Pennsylvania Digest*, col. 660), is not really an authority to that effect. In that case there was a devise in fee-simple to Stephen Barnet, and a devise over on his death without issue or children, to certain persons "(provided the said Stephen should not make sale of the aforesaid property), if he, the said Stephen, should sell the aforesaid property, he may grant and assign as he likes." Stephen, for a nominal consideration, conveyed the land and took a reconveyance. It was held that the executory devise was destroyed, the word sell being interpreted as covering the conveyance in question; but both the Common Pleas and the Supreme Court expressly disclaimed giving any opinion upon the effect of the power of alienation if unexercised. **WOODWARD, P. J.**, said: "It may be, though this point is not considered,

that if no attempt to exercise the authority had been made, and the estate stood at Stephen's death as it stood at the time of his succession under the will, the provision would have been unimportant. . . . In this view of the case [*i. e.*, the effect of the conveyances], it is unnecessary for the Court to consider the effect upon Stephen Barnet's title under the limitations of this will of the power of alienation in fee, if he had done no act in the exercise of that power." And in delivering the opinion of the Supreme Court, READ, J., said: "It is not necessary to examine into the exact nature of the estate that would have been vested in Stephen Barnet, if he and his wife had not made the conveyance of the 22d January, 1834, but the true question is, whether the conveyance and the deed poll of the 22d May, or the same year endorsed upon it and executed by the grantee and his wife, did not vest a fee-simple in Stephen Barnet."

Character of Limitation which will or will not Manifest Absolute Control. Fee in Emphatic Terms.

Where the estate of the first taker is merely a fee simply limited in terms of a more than ordinarily strong character, it will not be held to defeat the limitation over; as in *M'Rees v. Means*, *supra*, where the expression was to A. and "his heirs and assigns forever, to his use, behoof, and benefit, in fee." See also *Terry v. Wiggins*, 2 Lans. 272, S. C. on appeal, 47 N. Y. 512.

Fee with General Power of Disposition.

Where the first estate given is a fee, and a general power of disposition is added thereto, the devise over will be void, *Newland v. Newland*, 1 Jones Law 463; and see *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. St. 219, in this case, however, it is to be noted that the clause, which it was argued constituted the devise over, was in precatory words.

Life Estate with Express Power.

But where a life estate only is given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life estate is not thereby enlarged to a fee, or made an absolute right to the destruction of the devise over, *Ramsdell v. Ramsdell*, 21 Me. 288; *Cook v. Walker*, 15 Ga. 457; nor will a power of sale generally, attached to an expressly devised life estate, enlarge it to a fee, *Rail v. Dotson*, 14 S. & M. 176; and see cases cited, Vol. I., p. 65.

And a court has even gone so far as to insert words to make a life estate,

and so sustain the devise over, where such appeared to be the intent of the testator. In *Hamlin v. U. S. Express Co.*, 107 Ill. 443, the devise was as follows: "To my wife Lucinda Woods for her own use and benefit, with full power to hold, use, enjoy, or dispose of the same in any manner she may choose, and if she so desires she shall have full power and authority to convey any and all of my real estate by absolute conveyance in fee-simple. After the death of my wife Lucinda Woods, it is my will that all my real estate which shall not have been conveyed by her shall be sold," etc. The Court, in construing the devise, inserted the words "during her natural life," to qualify the estate and power given to the widow, and sustained the devise over. While in this case the intent of the testator was doubtless carried out, yet it is thought that it would be hard to find a case in which a more absolute power of control is vested in the first taker, which fact seems recognized by the Court by its insertion of the words "during her natural life," so as to bring the case within the rule above stated; for it is to be noted that the wife's power was not limited, as to its exercise, to any necessity, or for any purpose, or upon any particular event, but was an absolute power to dispose of the fee if she should so desire. To us, therefore, the decision in this case seems a violation of the principle that a devise over after the gift of an absolute fee is void. See cases *infra*.

It is to be noted that while the form of the direct devise to the first taker may be that of a life estate, yet subsequent expressions in the will may so far control the words as to render the estate of the first taker an absolute fee. In *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21, the testator made a devise to his wife "for life, and after her death it is my wish, unless she shall have earlier divided the same or disposed of it by will, that the same shall be equally divided among my children." Later in the will he used the following words: "I have willed to my wife all my estate . . . to her and her heirs forever, untrammelled by any restrictions and conditions, and only controlled in the manner of managing the same as far as my wishes above expressed may control her in the manner of disposing of the same." The devise over was held void. But, to accord with the general rule on the subject, it would seem that to have the effect of so enlarging the life estate to an absolute fee or to render the devise over void, the subsequent expressions must practically substitute one estate for the other, and not be merely such as by themselves would raise a power of disposition.

Fee with Power Limited as to Purpose or Event of Exercise.

Where the power is given, even where the first devise is of a fee, to absolutely dispose of the entire property in a certain event, as where there is a power to apply so much of the estate as may be necessary for the use

or support of the first taker, the devise over will not be void. As said by PARKER, C. J., in *Eaton v. Straw*, 18 N. H. 320: "The devise over to the defendant is not to be held void merely because, in the exercise of her power, she [the first devisee] might, if her need had required it, have defeated the devise over to him by a disposition of the whole property. That does not show the power to be a general one. It merely proves that a limited power might possibly have exhausted the property." And it has been so held where the judgment as to whether the entire subject of the devise is required for support has been vested in the first devisee himself; thus, in the case of *Terry v. Wiggins*, 2 Lans. 272, S. C. 47 N. Y. 512, there was a devise to a certain person of a lot of land, "for her sole and absolute use and disposal," and of all other realty and personalty of the testator, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in the whole, if she should require it or deem it expedient to do so." The Court held that there was no such devise to the first taker as would destroy a devise over on her death. This case was decided under the Revised Statutes of New York; but the Supreme Court, in giving judgment, expressed its opinion that the devise over would have been good at common law also. The Court of Appeals, however, in affirming the judgment, abstained from giving any opinion on the latter point, as being unnecessary for the decision of the cause before it.

Restriction of Power as to Time of Exercise or as to Persons in whose Favor it may be Exercised.

Where there is a limitation as to the time at or within which the right of disposition is to be exercised, or as to the persons to whom conveyance may be made, the devise over will be sustained; thus, where there is a devise to one and his heirs, provided he "shall not sell or convey within fifteen years after my decease unless such sale shall be made to some one of my children," followed by devise over, on a definite failure of issue the devise over is good, *Hill v. Hill*, 4 Barb. 419, though it may be destroyed by the lapse of time (see *infra*).

In *Den d. Trumbull v. Gibbons*, 2 Zab. 117, a devise was made to W. Gibbons, and if he should die without lawful issue and intestate, then over, with a clause in which the testator expressed his intent to be that the property should "by no casualty in this life go to J. M. Trumbull [his son-in-law], or all or any of his children, or one or more of them, or either of their descendants," with a condition forfeiting the estate of Gibbons in case anything should be given by him to Trumbull. The fettering of the disposing power, so that none of the persons designated by the testator

could take the estate, was held to prevent the vesting of an absolute fee in the first taker.

Intention that Apparent Absolute Power should be Exercised for Special Purpose.

Where the will shows an intention that the power of disposal, although given in absolute terms, shall be exercised to effect a particular result in the law—such as the exclusion of marital rights—it has been held that the devise over will be sustained, and it would seem with perfect propriety and justice, in furtherance of the will of the testator, who, while subordinating the interests of the executory devisee to those of the first taker, must be regarded as, at least, desiring to benefit the executory devisee in the second place. Thus in *Stones v. Maney*, 3 Tenn. Ch. 731, there was a devise of land to E. B. S., free from the control of her husband, with power, expressed to be absolute, “to dispose of [the land] as she may deem proper by will, deed, or otherwise, as if she were a feme sole;” and the will continued, “if she should die before her husband, said property shall be for the use of her children only.” The Chancellor held that the intent of the testator was to benefit the children of the first devisee and to exclude from the benefits of the devise her husband, either or both of which objects might be defeated if the first devisee were regarded as having an absolute fee and the absolute control of the property, and the executory devise were held void, as incompatible with the absolute estate, and accordingly decided the devise over good.

Power Limited as to Method of Exercise.

It has been held that the power of disposition to have the effect of destroying the executory devise over must be general, not only in the sense in which the word is above used, but as to the means of conveyance or disposition, and that where the right of disposition of the first devisee is limited to any particular method of conveyance, the limitation over will be good; thus in *Hall v. Robinson*, 3 Jones Eq. 348, there was a limitation over on the death of the first taker within a certain age, without issue and intestate; it was held that the devisory power impliedly given by the condition of intestacy would not destroy the devise over. And see *Andrews v. Royce*, 12 Rich. 536.

This distinction is not recognized in some authorities; thus, in *Karker's Appeal*, 60 Pa. St. 141, there was a devise over in case Joseph Rex “should happen to *dye* intestate and without issue;” BREWSTER, J., in de-

livering the opinion of the Orphans' Court, said: "It will also be observed that the power in Joseph of making a will is fatal to the executory devise, if such it is to be called, in favor of William;" citing *Jackson v. Robins*, 16 Johns. 585; and the Supreme Court, in affirming the judgment, refused to consider whether a definite or indefinite failure of issue were intended by the will, as it regarded the words "shall happen to die intestate" as manifesting an absolute fee-simple in the first devisee. In support of this position, READ, J., cited 2 Jarman on Wills, p. 15. And in a prior case *Jaureche v. Proctor*, 48 Pa. St. 466, a testator devised to his wife *inter alia* a plantation. The will contained the following clauses: "Article 3. She is not to divest herself of what I may leave her until after her death. Article 4. At the death of my above-named wife, what I may have left her, that is to say, the residue, is to be divided in equal shares among our children." The Court held that the devise over was void as after an absolute fee-simple; WOODWARD, C. J., saying: "'She is not to divest herself of what I may leave her until after her death,' implies that she may dispose of the estate by will which can only take effect after death, but that she shall not dispose of it by deed which must take effect during her life. The paramount thought in the testator's mind was to make his wife absolute owner of his estate, and he expressed this thought by sufficient words; but the particular thought was to take away from her one of the incidents of absolute ownership; in other words, that he would grant a fee, with power of testamentary disposition but withhold the power of alienation. . . Such then is the will—the devise of an absolute estate to the wife, with all the rights of a tenant in fee, except the power of alienation and with direction that what remains of the property at her death may be equally divided among the children. Now a power of alienation is necessarily and inseparably incident to an estate in fee, and therefore, if lands be devised to A. and his heirs upon condition that he shall not alien, the condition is void." And see *Armstrong v. Kent*, 1 Zab. 509. It is submitted, however, that the distinction is well founded in reason; it is true the books abound in cases which say that a condition repugnant to the estate granted cannot be sustained, and that a favorite example is the futility of an attempt to take from the grantee or devisee of a fee-simple the power of alienation or disposition; but it is equally true that in the case of an executory devise the law does recognize a qualified fee-simple, and the only reason that a general power of disposition added thereto will destroy a devise over, is that the general power adds to the qualified fee just those qualities in which the qualified fee was lacking, and, therefore, converts it into an absolute fee-simple, thereby exhausting the entire estate of the devisor; but if the devisor, after granting what the context of the will shows to be

a qualified fee, adds thereto a restricted power of disposition, and expressly or impliedly permits the first taker to dispose of his estate by will, or expressly or impliedly permits him to dispose of it by deed or by other conveyance *inter vivos*, then, on the familiar principle *mentio unius est exclusio alterius*, it would seem to follow that, as he cannot dispose of the estate in the way not named, the qualified fee is not enlarged or converted into an absolute one, and hence there still remains something to which the executory devisee may become entitled, and although his future estate may be defeated by the exercise of the power by the first devisee, still his interest will be recognized and protected by the law against any attempt of the first taker to destroy it in any other way than that in which the will permits him, and against any claim of an absolute estate by him.

Absolute Power may be Given by Implication.

The absolute power which will destroy a devise over need not be conferred in express terms, but may be given by implication; thus where there was a devise over of "what estate devised to him [the first devisee] he shall leave," *Ide v. Ide*, 5 Mass. 500; a devise over of "after the death of my wife [to whom the first estate was given] all my property, if any remains," *Ramsdell v. Ramsdell*, 21 Me. 288; a devise over in case the first taker should "die without a son and not sell the land," *Melson v. Doe ex d. Cooper*, 4 Leigh 408; a devise over of "the said property he [the first taker] dies possessed of," *Jackson ex d. Brewster v. Bull*, 10 Johns. 19, the executory devises were held void. In *Campbell v. Beaumont*, 91 N. Y. 464, there was a devise to Mary Ann Beaumont "to be enjoyed by her for her sole use and benefit, and in case of her decease the same or such portion as may remain thereof, shall be received and enjoyed by her son C. L. Beaumont." The devise over was held void on the ground that the property was to be spent by the first taker at pleasure. In all these cases powers of disposition were implied, but in *Andrews v. Royce*, 12 Rich. 536, there was a devise to two sons with the further proviso, "but should either of my sons die unmarried and without issue, then whatever may remain of his moiety of my estate I give and devise to the survivor." It was argued that the words "whatever may remain" implied an absolute power of use and alienation in the first taker, and that, in consequence, the devise over was void, and in support of this position were cited *Jackson ex d. Brewster v. Bull*, 10 Johns. 19; *Jackson ex d. Livingston v. Robins*, 16 Id. 537; *Attorney-General v. Hale*, Fitzg. 314; *Flanders v. Clark*, 1 Ves. Sr. 9; *Bull v. Kingston*, 1 Meriv. 318; *Burbank v. Whitney*, 24 Pick. 146. The estate comprised both realty and personalty. The Court refused to imply any general power such

as would defeat the devise over, WARDLAW, J., saying; "It is said to be of the essence of an executory devise that it cannot be prevented or defeated by the first taker by any alteration of the estate out of which or after which it is limited or by any mode of conveyance. This is altogether true as to the right of the first taker to bar the executory devise by fine or common recovery; but it is altogether fallacious if pressed to the conclusion that the executory devise must be independent of the will or action of the owner of the preceding estate. In fact, all executory devises depend to some extent on the discretion of the first taker. The most common case of a limitation in this mode is on the contingency of the first taker's dying without issue at his death, and may he not marry with the prospect of procreation or refrain from marriage at his caprice. . . . When she [the testatrix] speaks of whatever may remain of a moiety of her estate, she may be naturally and reasonably understood as referring to the remainder in the course of nature, and of the fit use by her son, without implying that she referred to the remainder not aliened or disposed of by her son with power to alien the whole—to the remnant of articles consumable in the use and to the survivors of slaves and other sentient chattels."

Where a will containing a devise in fee with an executory devise over provides that the first devisee shall not dispose of the property until after a certain time, or until he has reached a certain age, it will be held to confer an absolute power of disposition after such time, and the subsequent devise will become void on the expiration of the time limited, *Thompson v. M'Kisick*, 3 Humph. 631; *Booker v. Booker*, 5 Id. 505.

Before leaving the question of the effect of an absolute power of disposal upon a subsequent devise, it may be noted that while it seems established by the authorities that the effect is as above stated, still the doctrine has not gone without question. See *Andrews v. Roye*, 12 Rich. 536, *supra*, and the remarks of PARKER, C. J., in *Eaton v. Straw*, 18 N. H. 320.

In South Carolina Devise after Fee Conditional Void.

In South Carolina it is held that there can be no executory devise after a fee conditional, but this, as we shall see further on, rests upon a different principle from that which forbids a devise over after an absolute fee. See *Bedon v. Bedon*, 2 Bail. Law 231, and cases cited on page 515.

Charge on Devise in Fee will not *per se* Destroy the Devise Over.

A charge made by the will upon a devise in fee will not *per se* have the effect of destroying the devise over, *Jackson ex d. Decker v. Merrill*, 6 Johns. 188; *Jackson ex d. Staats v. Staats*, 11 Id. 337.

An Executory Devise which Violates the Rule against Perpetuities is Void.

2. The second great restriction upon the creation of an executory devise is derived from what is known as the rule against perpetuities, a rule which was the outcome of the struggle between the spirit of the common law and the feudal tendency of the years in which that law became established. It is not purposed here to give a history of the rule which, after a hard struggle, ended in the allowance of a very moderate restraint as to time upon the power of alienation, but we may be permitted to quote the quaint language of Lord COKE in *Mary Portington's Case*, 10 Rep. 42 b, as to the early attempts to make perpetuities through restraints upon the power of tenants in tail. "These perpetuities were born under some unfortunate constellation; for they, in so great a number of suits concerning them in all the courts in Westminster, never had any judgment given for them, but many judgments given against them; viz., Hil. 31 El., in the Exchequer Chamber, in *Chraleigh's Case*; Mich. 34 & 35 El., *Hunt and Capel's Case*, in the Exchequer Chamber; Hill 37 Eliz., *inter Chornley & Hunt*, in Communi Banco, and Hil. 37 El., *inter Germin & Aiscot*, in the same Court; Hil. 30 El., in *Corbet's Case*, in Communi Banco; Mic. 3 Jac., in the King's Bench, *Sir Anthony Mildmay's Case*, and *Sonday's Case*, in the Court of Wards, 8 Jac. Reg. All which cases I have reported, and in all which judgment was given against the perpetuity; and from these fettered inheritances the freeholds of the subject are thereby set at liberty, according to their original freedom."

Statement of Rule against Perpetuities.

The rule, in its bearing upon executory devises, was finally settled in the following shape: no executory devise is valid unless it must, from the very nature of the limitation, take effect, if at all, within a period comprised within a life or lives in being, and twenty-one years thereafter, with the possible addition of the period of gestation, 2 Blackst. Com. 174; Fearné Cont. Rem. 432; 4 Kent's Com. 267; *Rhoads v. Rhoads*, 43 Ill. 239; *Waldo v. Cumming*, 45 Id. 421; *Lunt v. Lunt*, 108 Ill. 307.

The addition of the period of gestation, although the time is sometimes spoken of as a term in gross, see *Moore's Trustees v. Howes' Heirs*, 4 T. B. M. 189, is to be made, it seems, only in those cases wherein gestation actually takes place, as was resolved by A. PARKE, LITLEDALÉ, GAZELEE, BOSANQUET, ALDERSON, J. PARKE, and TAUNTON, JJ., and BAYLEY, VAUGHAN, BALLARD, and GURNEY, BB., and concurred in by Lord BROUGHAM and the House of Lords in *Cadell v. Palmer*, 1 Cl. & Fin. 372. And indeed, in

view of the policy of the law by which a child in *ventre sa mere* is regarded as *in esse*, for the purposes of taking by way of remainder or devise, the addition of the period of gestation would seem hardly necessary.

Common Law when Adopted in Several States by Statute. Statutory Variation Thereof.

The period of limitation which prevailed at the common law has been practically adopted by most of the States which have adopted statutes of perpetuity with reference to executory devises, though in some States there have been certain slight variations. See Georgia, Code, § 2267, p. 556; Iowa, M'Clain's Ann'd Stat., § 1920, p. 541; Indiana, Rev. Stat. (1881), § 2962, p. 588; Maryland, Rev. Code (1878), Art. 49, § 2, p. 419; in which States the common law rule is in effect reënacted. In Michigan, Howell's Ann'd Stat., § 5531, p. 1442; Minnesota, Rev. St., Ch. XLV., §§ 15, 16, p. 561-62; New York, Rev. St., Pt. 2, Ch. 1, Tit. 2, §§ 15, 16, p. 2176; and Wisconsin, Rev. St., § 2039, p. 615; the number of lives in being upon which a limitation may be made is restricted to two.

In New York it is held that the effect of the statute is to limit the suspension of the absolute power of alienation of the estate to the contingent duration of two designated lives, and not merely to fix a reasonable time during which such suspension might be tolerated; accordingly, it has been held that a limitation upon the minorities of two persons not designated in the will, or upon the minorities of three named persons, unless two of such persons were specially designated as those upon the expiration of whose minority or lives the determination of the first granted estate depended, would be ineffectual. See *Lorillard v. Coster*, 5 Paige 172, S. C. 14 Wend. 265; *Hawley v. James*, 5 Paige 318, S. C. 16 Wend. 61; *Hone v. Van Schaick*, 7 Paige 221, S. C. 20 Wend. 564; *Van Vechten v. Van Veghten*, 8 Paige 104; *De Peyster v. Clendinning*, 8 Id. 295; *Amory v. Lord*, 9 N. Y. 403; *Morgan v. Masterton*, 4 Sandf. 442; *Jennings v. Jennings*, 5 Sandf. 174; *Monarque v. Regua*, 53 How. Pr. 438.

The Connecticut statute of perpetuities is somewhat peculiar; it prohibits a limitation except to a person in being or his immediate issue or descendants, Gen. Stat. (1875), T. 18, Ch. VI., Pt. 1, § 3, p. 352.

"Under this statute," said PARK, C. J., in *Rand v. Butler*, 48 Conn. 293, "it has been held that any conveyance by devise, bequest, or grant which may by possibility violate the statute is void whether it does so in fact or not." In the case of *Jocelyn v. Nott*, 44 Conn. 55, the Court said "all estates must vest during the lifetime of some person in being or the lifetime of the issue of some person in being." And in *Rand v. Butler*,

where the devise was to trustees for Thomas Bradley for life, "and on the decease of the said Thomas Bradley, then the said trustees are to deliver said land and house to my heirs-at-law to be to them and their heirs and assigns forever," the Court held that if the heirs referred to were those who filled that position at the death of Bradley, the devise to them would be in violation of the statute and void. See *Alfred v. Marks*, 49 Conn. 473.

In California, the statute prohibits the suspension of the absolute power of alienation for a time longer than the continuance of the lives of persons in being at the time of the creation of the limitation, except that a remainder in fee may be created on a prior remainder in fee, to take effect in case the estate of the first remainderman is divested, by a contingency upon which it depends, before reaching the age of twenty-one, Civil Code, §§ 5715, 5772, pp. 680, 684.

Unless the Devise Over is so Limited that it *Must* Take Place within the Prescribed Period, it is Void.

The rule is imperative that to be valid the limitation must, by the terms of its creation, take effect, if at all, within the prescribed period. If the limitation be in such terms that it may or may not take effect within the said time, it is void, *Patterson v. Ellis*, 11 Wend. 259; *Tator v. Tator*, 4 Barb. 431; *Donohue v. M'Nichol*, '61 Pa. St. 73; *Stone's Ex'r v. Nicholson*, 27 Gratt. 1; *Downing v. Wherrin*, 19 N. H. 9; *Jackson v. Phillips*, 14 Allen 572; *Attorney-General v. Wallace's Devisee*, 7 B. Mon. 611; *Sears v. Russell*, 8 Gray 86; *Sears v. Putnam*, 102 Mass. 5; *Barnes v. Barnes*, 3 Cr. C. C. 269; *Dallam v. Dallam's Lessee*, 7 H. & J. 237; *Booker v. Booker*, 5 Humph. 505; *Stephens v. Evans*, 30 Ind. 39; *Robinson v. Bishop*, 23 Ark. 378; *Rand v. Butler*, 48 Conn. 293; *Alfred v. Marks*, 49 Id. 473. Thus a devise to an ecclesiastical society, whenever it shall desire to erect a place of worship upon a certain lot and certain testamentary trustees shall be satisfied that the society is permanently established, has been held void for remoteness; for, while the condition of affairs provided for might exist at the time of the testator's death, it might not come into existence for many years past the term of a life in being at the death of the testator, *Jocelyn v. Nott*, 44 Conn. 55; and so a devise over, in case land should be built upon, has been held void for remoteness, *Smith v. Townsend*, 32 Pa. St. 434.

Devise Void for Remoteness Void *in toto*.

Where a devise is void for remoteness, it will not be void only for the excess, but will be wholly void, *St. Amour v. Rivard*, 2 Mich. 294. This is well established law, although its apparent hardship has been recognized, as said by Sir WILLIAM GRANT, in *Leake v. Robinson*, 2 Meriv. 363: "Per-

haps it might have been as well if the courts had originally held an executory devise transgressing the allowed limit to be void only for the excess, where the excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled."

By statute, in Georgia, it is provided that where an attempt is made to create a perpetuity, effect shall be given to the limitations which are not too remote, the others are declared void, and the fee becomes vested in the last taker under a legal limitation, Code (1882), § 2267, p. 556. This, to a certain extent, is simply declaratory of the common law, for by it each executory devise must be judged by itself, unless it be made dependent upon a precedent limitation, and so a part of it, and the viciousness of a succeeding cannot effect the validity of a prior devise.* The rule, as expressed by BIGELOW, J., in the *Church in Brattle Square v. Grant*, 3 Gray 142 (*ante*, Vol. I., p. 181), is, "if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted." But where the limitation which would fall within the allowed limit is so bound up with one which falls without the same as to constitute in fact but one disposition of the property, there the common law will not interfere to save the prior limitation, and in such a case the Georgia statute might well have effect; this position of the common law is well illustrated by the case *St. Amour v. Rivard*, *supra*. In that case certain devises were made, and were explained in the will as follows: "It is well to be understood that all and every single disposal of real estate in this my testament is only for the use and benefit of him or her in whose favor it is made, his or her life lasting, and that it is my formal will that neither my real estate, nor any parcel thereof, will ever be sold or alienated in any whatsoever manner, but that after the decease of those several to which shares or parcels of my real estate have been assigned the said shares or parcels will remain for the use and benefit of the descendants of him or her to whom a share has been assigned, their lives lasting, and so on; and in case of demise without posterity, the said share shall accrue to the use and benefit of the owner, or of the owners, being of my relation or descendants, their life lasting, of the next share or shares, and so on, as long as any posterity will exist; and in case of extinction to the next heirs." The Court refused to construe the devise as giving an estate which could be vested in the second taker, although such an estate would vest within the time allowed by the rule, for the evident intent of the whole devise was to tie up the power of alienation and create a perpetuity,

* This, of course, is to be taken as referring only to the operation of the common law on the devise itself and not with reference to the devolution of the land, which of course, by the common law, when governed by no valid devise, would descend as in case of intestacy.

and there was no ground discernible in the will which would, upon the principle of *cy pres*, enable the Court to say it was carrying out the intention of the testator as nearly as might be by holding that a fee vested in the second taker, for the devise to him was so bound up with the general scheme of a perpetuity that it could not be separated therefrom.

Subsequent Limitations Avoided by Remoteness of Preceding Limitation.

Where a preceding limitation is void for remoteness, all subsequent dependent limitations are void also, they are not advanced. Examples of the application of this rule are found in *Robinson v. Hardcastle*, 2 Bro. Ch. Cas. 22, S. C. 2 D. & E. 241; *Cambridge v. Rous*, 8 Ves. 12.

If Devise not too Remote, Character of Preceding Estate not Material.

If the executory devise, by its terms, must take effect, if at all, within the time prescribed by law, it is a matter of indifference whether the fee or other estate which precedes the limitation over be an immediate one or a remainder, vested or contingent, *Lovett v. Lovett*, 10 Phila. 537; *Leavitt v. Logan*, 3 Wall., Jr. 184.

Devise Over on Failure of Issue. Definite or Indefinite Failure.

The question of the application of the rule against perpetuities most frequently arises in cases in which there is a devise in fee with a limitation over on failure of issue of the first taker. The rule in such cases universally admitted is, that where the failure intended is a definite one, *i. e.*, a failure at some given definite time within the period allowed by the rule against perpetuities, as, for instance, at the death of the first taker, the devise over is valid, but where an indefinite failure is intended the devise over is void, *Anderson v. Jackson ex d. Eden*, 16 Johns. 382; *Jackson ex d. Herkimer v. Bellinger*, 18 Id. 368; *Wilkes v. Lion*, 2 Cow. 333; *Lion v. Burtiss*, 20 Johns. 483; *Haines v. Witmer*, 2 Yeates 400; *Toman v. Dunlop*, 18 Pa. St. 72; *Vaughan v. Dickes*, 20 Id. 509; *Huxford v. Milligan*, 50 Ind. 542; *Riddick v. Cohoon*, 4 Rand. 547; *Hill v. Hill*, 4 Barb. 419; *Maxwell v. Call*, 2 Brock. 119; *Hatton v. Weems*, 12 G. & J. 84.

Devise Over on Death Without Issue Implies an Indefinite Failure.

Where the expression of the will is simply—to A., and on his death without issue, or on his dying without issue, then over, the law is well settled,

that in the absence of statutory direction to the contrary, an indefinite failure of issue will be held to have been intended. This was established in England as early as 26 Eliz., see *Vincent Lee's Case*, 3 Leon. 111, Fearné Cont. Rem. 444, and continued to be law until the statute of 1 Victoria, Ch. 26, § 29, and has been almost universally admitted to be law in this country; as said by BOYLE, C. J., in *Moore's Trustees v. Howe's Heirs*, 4 T. B. Mon. 199: "Strained and artificial, however, as such a meaning of the words may be, a majority of the modern cases agree that the expression of dying without issue should be taken to import an indefinite failure of issue unless the contrary appears from other circumstances in the will." It seems to be established as a rule of property, and beyond question, *Kay v. Scates*, 37 Pa. St. 31; *Downing v. Wherrin*, 19 N. H. 9; *Hall v. Chaffee*, 14 Id. 215; *Bramlet v. Bates*, 1 Sneed 554; *Hollett's Lessee v. Pope*, 3 Harringt. 542; *Chism v. Williams*, 29 Mo. 288; *Jackson v. Dashiell*, 3 Md. Ch. 257.

Aliter in Ohio.

In Ohio, however, it has been denied that the rule is in force, and the expression, "die without children," "heirs," or "issue," has been held to refer to the death of the ancestor in the absence of evidence of a contrary intent, see *Parrish's Heirs v. Ferris*, 6 Oh. St. 563; and in *Niles v. Gray*, 12 Id. 320, BRINCKERHOFF, J., said: "The arbitrary and artificial rule of construction so long prevailing in the English courts, and so inconsiderately adopted and followed in some of the States of the Union, that such expressions as 'dying without issue,' and the like, meant an indefinite failure of issue, when first adopted in England, could be excused and accounted for, if not justified, on two grounds, first, that from the very structure of English society it was part of English policy to encourage the perpetuation of family estates; and second, that these estates tail were common, present, and familiar to the mind of every testator. Here, on the contrary, the public policy is to discourage perpetuities. Estates tail are utterly unknown to the generality of our people; our laws forbid them, and every presumption is against the supposition of an attempt to create them. . . . The arbitrary and artificial rule contended for by the counsel for the defendant has never become a rule of property in Ohio." And see *Piatt v. Sinton*, 37 Oh. St. 353.

Criticism of Rule.

In Georgia, the denunciation of the rule has been carried even further, and it has been declared to rest upon a misconception by the English

courts of the statute *de donis*. The question was, in the case of *Harris v. Smith*, 16 Ga. 545, very learnedly considered by STARNES, J., who, after reciting the provisions of the statute *de donis*, maintained that the rule that the expression "dying without issue," or its equivalent, implied an indefinite failure of issue, was the result of construction alone, and not of the terms of the statute; because, after referring, first, to the case where land is given to any man and his wife, and to the heirs begotten of their bodies, with condition that if they die without heirs of their bodies begotten between them, the land should revert, second, to the case where land is given in free marriage, with condition annexed, that if the wife and husband die without heirs, the land given should revert, third, to the case where one giveth land to another, and the heirs of his body issuing, the statute declared that in such cases, after issue born, the feoffees had had power, theretofore, to disinherit the issue, and that although whenever issue had failed the land ought to return to the donor, yet, by the deed of the donee, the donors had been barred, wherefore, it was by the statute enacted that the will of the donor should be observed, so that the land should revert to the giver "if issue fail; where there is no issue at all (*per hoc quod nullus sit exitus omnino*), or if any issue be, and fail by death, or heirs of the body of such issue failing." "We thus see," then continued the learned Judge, "that there is nothing in the statute which sanctions the idea that when one was said to *die without issue*, or heirs, reference was had to a failure of issue at any remote time after his death. On the contrary, where-soever therein reference is made to dying without issue, or heirs, the statute clearly shows that it is intended as a reference to such failure at the death; and, as if to make it more plain, that the words used were intended to be employed only in their natural significance, the last clause which I have just given emphasized the two things, viz., a failure of issue at the death of the ancestor, and a remote or indefinite failure, are brought into juxtaposition, and carefully expressed the first by the words 'if issue fail (where there is no issue all), or if issue be, and fail by death,' and the second by the words, 'or heirs of the body of such issue failing.'" Then, after admitting the construction usually put upon the words to be established by the English authorities, the opinion proceeds, "Still, it is but the construction of the courts. It is not the natural, legitimate, and idiomatic signification of the words. It is not what the statute speaks, but what the English courts have said that the statute speaks. We have ascertained this for ourselves by a critical examination of the statute; but to the point we have the testimony of the most eminent English lawyers and judges." As supporting this position, his Honor cited Lord MACCLESFIELD, in *Pin-burry v. Elkin*, 1 P. Wms. 563; Lord THURLOW, in *Attorney-General v.*

Hird, 1 Br. Ch. Cases 170; Jarman on Wills 316; Lewis on Perpetuities; he admitted, however, that the pre-revolutionary construction of the language was, in the absence of legislation upon the subject, binding, but held that on the abandonment by the State of Georgia of the feudal policy, upon which the statute *de donis* was based, the rule of construction was abrogated, saying: "But we have taken some pains to show that this rule was the result of construction, and not the language of the statute *de donis*, because it seems to us that as such it has been repealed in our State. To show this, we must assert the reason for the rule. It must spring, of course, from the same source out of which arise the estate tail and the perpetuity. Its remote ancestor was feudal policy, its immediate progenitor the interest of the heir at law. . . . But in our State primogeniture has been abolished; there is technically no heir at law; real and personal estate for purposes of distribution have been placed on the same footing and estates tail have been prohibited, therefore the reason for the conventional rule of construction which we have been considering, and on account of which these words now under review have been twisted from their natural meaning has been repealed. Should not the rule fall with the reason?" See also *Griswold v. Green*, 18 Ga. 545.

Notwithstanding the strong dissents above noted, the rule may be said to be in force in all the States of the Union except Ohio, where it has not been altered by statute, and in those States where statutes altering the interpretation have been passed, the rule will still apply to wills made before the passage of the statutes.

Rule Applies though Form of Expression be Varied.

The rule applies, although the form expressing death without issue be varied; thus, the expressions, "in default of such lawful issue," *Kleppner v. Laverty*, 70 Pa. St. 70; "die without heirs," or "lawful heirs of the body," *Sydnor v. Sydnors*, 2 Munf. 263; *Randolph v. Wendel*, 4 Sneed 646; *Tidball v. Lupton*, 1 Rand. 194; "die without lawful heirs of his body," *Robinson v. M'Donald*, 2 Ga. 116; "die without lawful issue," *Brown v. Brown*, 3 Ired. L. 134; *Bramtley v. Whitaker*, 5 Id. 225; "upon failure of lineal heirs," *Village of Brattleboro v. Mead*, 43 Vt. 556; "die without a lawful heir," *Eldridge v. Fisher*, 1 Hen. & Munf. 559; have all been interpreted as implying an indefinite failure of issue, and an indefinite failure has been held to be implied where special reference is made to the devisee, such as might at first sight seem to imply failure of immediate offspring, as where the expression has been "die without heirs lawfully begotten of her body," *Curry v. Sims*, 11 Rich. 489; "die without issue of her own body," *Rid-*

die v. *Cahoon*, 4 Rand. 547; "die without heirs lawfully begotten," *Tator* v. *Tator*, 4 Barb. 431; "die without heirs lawfully begotten of his body," *Hallowell* v. *Kornegay*, 7 Ired. L. 261. The same rule applies where the limitation over is on default of heirs male, see *Conklin* v. *Conklin*, 3 Sand. Ch. 64.

The mere fact that the failure is expressed as a contingency, as "if," or "in case," or "in the event" the devisee die without issue, will not alter the interpretation, *Hill* v. *Burrow*, 3 Call 342; *Tate* v. *Tally*, Id. 354; *Elldridge* v. *Fisher*, 1 Hen. & Munf. 559; *Morehouse* v. *Cotheal*, 21 N. J. Law 480; *Goodrich* v. *Harding*, 3 Rand. 280; *Watkins* v. *Quarles*, 23 Ark. 179.

And it may be added, that an instance may be found in which words have been supplied in the construction of a will whose force was to make a devise over on an indefinite failure of issue, where such appeared to be the testator's intent. Thus, in *McClintie* v. *Mamus*, 4 Munf. 328, the will ran "if it should please God that any of my sons should die, their part or parts to be equally divided among the rest of their brothers, and likewise with my daughters in case any should die." The Court held that death without issue was meant, and held the devise over void, as after an indefinite failure of issue. This case would seem to be open to criticism, for presumably the intent of the testator was, that on the death of a son without issue then living, his share should go over; and as the testator had not used words to which a legal technical force had been attached, it would appear certainly more reasonable that the Court should, while professing to supply words in furtherance of the testator's intention, have supplied such as would import a definite failure.

Expressions which will Confine Failure of Issue to a Definite Failure.

While the rule stands, the courts have recognized the fact that in many cases its enforcement tends to the utter defeat of the testator's wishes, and hence have seized upon circumstances in the will which show the testator's intent to be to limit the time of failure of issue to a definite period, *e. g.*, the death of the first taker (to a failure at which time the term definite failure of issue is generally applied), in order to control the force of the words importing failure of issue, and so uphold the devise over, *Moore's Trustees* v. *Howe's Heirs*, 4 T. B. Mon. 199; and it would seem that in this country this power of interpretation should in a doubtful case be exercised favorably to executory devises, as said by EWING, C. J., in *Hart* v. *Thompson's Adm'r and Heirs*, 3 B. Mon. 482: "While the English courts in a doubtful case, consistently with the policy of their government, might feel

authorized to construe the devise into an entail, we, in a doubtful case, would feel authorized to give such construction to the devise as would carry out the intention of the devisor, and give effect to the devise according to such intention."

Effect of Use of Word "Leaving."

We shall proceed to consider cases in which it has been held that the strict construction of the clause providing for a failure of issue will or will not be relaxed by the accompanying parts of the will. The effect of the introduction of the word "leaving" into a devise, as where there is devise over if the first devisee shall die, "leaving no heir," or "no issue," has been the subject of considerable discussion in the courts. The rule as finally settled is, that the devise over, on the death of the first devisee without leaving issue, will in the case of a devise of freehold be held to be upon an indefinite failure of issue; but in the case of a devise of a leasehold or chattel interest it will be held to be upon a definite failure. This distinction rests, to a very great extent, on the authority of the decision in *Forth v. Chapman*, 1 P. Wms. 663. In that case, a testator devised leaseholds to his nephews, William and Walter Gore, and a freehold to William, and further ordained that "if either of the nephews should depart this life, and leave no issue for their respective bodies," the estate given him should go to the daughter of the testator's brother and the children of his sister. In passing upon the effect of the limitation, Lord PARKER said: "As to the freehold, the construction should be if William or Walter died without issue generally, by which there might be *at any time* a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*." His Lordship further remarked that "it might be reasonable enough to take the same words as to the different estates in different senses, and as if repeated by two several clauses (*viz.*): I devise to A. my freehold land, and if A. die without leaving issue, then to B.; and I devise my leasehold to A., and if A. die without leaving issue, then to B.; in which case the different clauses would (as he conceived) have the different constructions above mentioned to make both the devises good; and it was reasonable that it should be so, *ut res magis valeat quam pereat*." This distinction, although questioned by Lord KENYON, in *Porter v. Bradley*, 3 D. & E. 146, and *Roe v. Jeffery*, 7 Id. 589, is well established in England; *Crooke v. De Vandes*, 9 Ves. 203; *Elton v. Eason*, 19 Id. 79; *Cole v. Goble*, 13 C. B. 443; *Bamford v. Lord*, 14 Id. 708; *Secombe v. Edwards*, 28 Beav. 443.

On this side of the water there has been considerable conflict over the

case of *Forth v. Chapman*, and the distinction taken in it. On the one hand, STARNES, J., in *Harris v. Smith*, 16 Geo. 545, puts the pertinent question: "How is it possible that this double meaning, this esoteric and exoteric signification, as it were, can belong to the same terms of the same law?" And the case is unfavorably criticised by THOMPSON, J., in *Fosdick v. Cornell*, 1 Johns. 440, and slightly spoken of in *Morgan v. Morgan*, 5 Day 517, and, in *Eichelberger v. Barnitz*, 17 S. & R. 293, GIBSON, C. J., speaks of "judges eagerly catching at accidental words, such as 'leaving,' 'behind him,' etc.; and from these endeavoring, by forced conceits and flimsy distinctions, to support 'executory devises of chattels.'" And the Supreme Court of the United States, with *Chapman v. Forth* before it, said: "Lord KENYON . . . very justly remarks that 'the distinction taken in *Forth v. Chapman*, 1 P. Wms. 663, that the very same words in a will should receive one construction when applied to one portion of the devise, and another construction as applied to another, is not reconcilable with reason.' . . . A rule of construction which would give different meanings to the same words in the same sentence could only be tolerated where, from the whole context of the will, it is evident that without such construction the general intent of the testator as to the disposition of his realty would be frustrated," *Abbott v. Essex Co.*, 18 How. 202. But, on the other hand, we have the distinction of *Forth v. Chapman* taken up and the case approved by the Court of Appeals of Maryland in *Allender v. Sussan*, 33 Md. 11; in which case, MILLER, J., in delivering the opinion of the Court, said: "There is, however, this distinction, subtle it may be but too well established now to be overturned, between an executory limitation of personal property upon a dying without leaving issue (the words of the present will) and the same limitation of real estate. The distinction, the leading authority for which is *Forth v. Chapman*, 1 P. Wms. 663, runs through all the decisions, and applies even where real and personal estates are comprised in the same gift," *Biscoe v. Biscoe*, 6 G. & J. 236; *Usilton v. Usilton*, 3 Md. Ch. Dec. 36; *Budd v. Posey*, 22 Md. 48; *Woodland and Wife et al. v. Wallis*, 6 Md. 151; and *Wallis v. Woodland and Wife et al.*, 32 Md. 101. And see also *Hill v. Burrow*, 3 Call 342; *Royall v. Eppes*, 2 Munf. 479; *Eldridge v. Fisher*, 1 Hen. & Munf. 559; *Mazyck v. Vanderhorst*, 1 Bail. Eq. 48; *Buist v. Dawes*, 4 Strobb. Eq. 37; *Flinn v. Davis*, 18 Ala. 132.

In *Brummet v. Barber*, 2 Hill (So. Car.) Law 543, O'NEALL, J., said: "I am satisfied there is no positive and substantial legal distinction arising from the nature of the thing devised or conveyed, whether real or personal, 4 Kent. Com.; Butler's Fearn, 1st American from 6th London edition, margl. page 363, note *b* to sec. XII., also pp. 364-5-6-7. Although there

is no such positive and substantial legal distinction, yet there is no doubt that the Court is not so strictly bound down to an artificial rule of construction in personal as in real estate, and that in the former they will lay hold of words to tie up the generality of the expression of dying without issue and confine it to dying without issue living at the time of the first taker's death, which will not have that effect in the latter (real estate), *Butler's Fearn*, marg. pp. 357-361. As in the cases of *Forth v. Chapman*, *Martin v. Long*, *Read v. Snell*, *Mazyek v. Vanderhorst*, the words 'leaving no issue,' and 'leaving no heirs of her body,' could not in real estate prevent the limitation over from being too remote; but, as applied to the personal estate, they were held to restrict the generality of the expression, and to mean 'leaving no issue living at the time of the first taker's death, and that the limitation over as to the personalty was good.'"

In North Carolina it is held that since the statute of 1784, abolishing estates tail, the same construction should be put upon words importing a failure of issue in bequests of chattels as in devises of freehold, *Clapp v. Fogelman*, 1 Dev. & Bat. Eq. 466.

The expression, "die leaving no issue living," has been held to show a definite failure of issue, *Wallington v. Taylor*, Saxt. 314; and so in *Den ex d. Van Middlesworth v. Schenk*, 3 Hals. 29, in a devise over on the death of the first devisee "without issue alive," was held good; but in neither of the cases was the use of the word "leaving" or "living" or "alive" essential to the decision of the cause, as in the first there was a devise over to three sisters of the devisee, and in the second to survivors.

A devise to a grandchild *in esse*, and "in case she die without lawful issue then living, then and in such case her share shall be divided among my surviving children or their lawful representatives," has been held a good devise apparently from the force of the expression, "then living," *Jackson ex d. Kip v. Kip*, 2 Paine 366.

Whatever may be said of the distinction above taken, the rule is well settled that a devise over of freehold on the first devisee dying without leaving issue imports an indefinite failure of issue. See cases above cited, and *Hawley v. Northampton*, 8 Mass. 3; *Carr v. Porter*, 1 M'C. Ch. 60; *Newton v. Griffith*, 1 H. & G. 111; *Morehouse v. Cotheal*, 1 Zab. 480; *Horton v. Archer*, 3 G. & J. 199; *Kay v. Seates*, 37 Pa. St. 31; *Middlesworth's Adm'r v. Blackmore*, 74 Id. 415.

Devise Over on Death Without Children.

Where the devise over is dependent on the death of the first taker without children, the failure of issue intended will generally be considered as

definite, *Richardson v. Noyes*, 2 Mass. 56; *Neave v. Jenkins*, 2 Yeates 414; *Smith v. Hunter*, 23 Ind. 580; *White v. Rowland*, 67 Ga. 546; *Mowatt v. Carow*, 7 Paige 328; *Fosdick v. Cornell*, 1 Johns. 440; *Chrystie v. Phyfe*, 22 Barb. 195; *Turner v. Ivie*, 5 Heisk. 223; *Sherman v. Sherman*, 3 Barb. 385. This last cited case was upon a will which fell within the provisions of the New York Revised Statutes; but the Court expressed its opinion that the same rule would apply at common law; and see *Den ex d. Southerland v. Cox*, 3 Dev. Law 394. In *Morgan v. Morgan*, 5 Day 517, where, after a devise in fee to sons of the testator, the will ran: "And also my will is that if my sons, or either of them, should die without children, that his brothers shall have his part in equal proportions," the Court was of the opinion that the contingency of dying without children did not necessarily imply a definite failure of issue, but held that, construed in connection with it, the devise over to the brothers showed that such a failure was intended. In the *Attorney-General v. Wallace's Devisee*, 7 B. Mon. 611, there was a devise to a daughter, with a devise over "in the event of the death of my above-named daughter without child or children, or should she not have any child alive at her death, or should her child or children die without issue; in either event, I do will and bequeath all or the whole of my estate that my daughter may own at their death" over. The Court interpreted the devise over as upon failure of issue of the daughter at her death.

A devise over on the death of the first taker without "heirs" may be so governed by accompanying expressions as to show that "heirs" was used in the sense of "children," and in that case the failure intended will be held to be a definite one. Thus, in *Berg v. Anderson*, 72 Pa. St. 87, there was a devise, which, under the rule in *Shelley's case*, was of a fee, to the nieces of the testator, "provided my said nieces or either of them should die without heirs, or their heirs or the heirs of either of them should all die in their minority and without issue, then, and in that case, the portion above devised to the use of such niece, or the portion of both, provided the contingency happens to both, shall vest absolutely in the heirs of my brothers and sisters." In delivering the opinion of the Court, WILLIAMS, J., said: "It is evident that by 'heirs' the testator meant children or issue of his nieces. They could not die without heirs so long as the heirs of his brothers and sisters named in the will survived; and it cannot be supposed that he was guilty of the absurdity of meaning that his devise over should depend on an event which could not happen without involving the extinction of its immediate objects. . . . The only question in the case, then, is whether the limitation over to the heirs of his brothers and sisters is good, or whether it is so remote as to be void. . . . It is clear that an indefinite

failure of issue could not have been intended. The estate in remainder was to go over on the death of the nieces without heirs, that is, without children or issue, or upon the death of the children in their minority and without issue. The limitation must, therefore, take effect, if at all, within twenty-one years after the death of the nieces; and the contingency upon which the limitation depended must necessarily happen within that time. The limitation, therefore, was not too remote, for the event upon which it was to take effect must occur within a definite period, that is, within a life or lives in being, and twenty-one years afterwards." In *Jones v. Miller*, 13 Ind. 337, the conclusion that "heirs" was used in the sense of children was drawn from the fact that the limitation over, on the death of the first taker, was to persons who would be the heirs should he die without children. And see *M'Gunnigle v. M'Kee*, 77 Pa. St. 81; *Jackson ex d. Staats v. Staats*, 11 Johns. 337; *Eby v. Eby*, 5 Pa. St. 461.

In *Clark v. Stanfield*, 38 Ark. 347, a husband made a devise to his wife "Esther Gregg and my bodily heirs the issue of said marriage forever," with a provision for the alteration of the amount of the devise to his wife should she remarry, and provided that on the arrival of the "heirs" at maturity the land should be equally divided between Esther and the said heirs, and should the said heir or heirs die before the years of maturity, this share should revert to Esther, "and should the aforesaid heir or heirs die as above described and the aforesaid Esther Gregg die without a lawful issue then to my heirs-at-law." The Court held that the testator had distinguished between his descendants by Esther and his heirs general, that the failure of issue intended was evidently a failure at the death of Esther, and that the devise to the heirs-at-law was not too remote.

In the *Village of Brattleboro v. Mead*, 43 Vt. 556, it was attempted to draw the conclusion from the use of the words "lineal heirs," in describing the failure of issue, that a definite failure was meant. The devise was to Frederick Zelotes Dickinson in fee, "provided, if the said Frederick Zelotes shall die without lineal heirs, or upon failure of my lineal heirs," the land should go over for the support of a school. In delivering the opinion of the Court, PECK, J., said: "If the question in this case depended solely upon the words, 'shall die without lineal heirs,' an examination of the authorities above alluded to might be deemed necessary. Looking at these words alone, there would seem to be reason for saying that Frederick would not die without lineal heirs if he had lineal heirs living at the time of his death, that survived him even if the line became extinct afterwards; yet there are many decisions to the contrary. But the testator . . . has furnished his own interpretation by the subsequent words, 'or upon the failure of his or my lineal heirs.'" The Court held the

devise over void for remoteness, regarding the alternative, "or upon failure of my lineal heirs," as showing the intent of the testator to provide for an indefinite failure of issue.

The force of the word "issue" has also, by means of the context, been turned into that of "children," and so held to show that a definite failure is intended. In *Hill v. Hill*, 74 Pa. St. 173, there was a devise over in the following terms: "Should my daughter, Sarah Ann Hill, die, leaving no issue, or child, that her share, as above bequeathed to her, shall fall back to my estate, and be equally divided, share and share alike, to Ann V. and Fanny K. Lee," etc. In delivering the opinion of the Court, SHARSWOOD, J., said: "The rule has been well expressed by Mr. Smith, in his valuable Essay on Executory Interests. 'When the limitation over is to take effect, not on an indefinite failure of issue of the prior taking, but on a failure of children only, or on a failure within a given time, then the limitation over will not raise an estate tail by implication in the prior taker, but he will have a life estate with a limitation over of a springing interest, or a fee with a conditional limitation over, as the case may be,' Smith on Ex. Int. 301; *Taylor v. Taylor*, 13 P. F. Sm. 481. Had the words here been, 'should my daughter Sarah Ann die leaving no issue,' the authority of *Eichelberger v. Barnitz*,* would have been decisive in favor of the construction which reduced his estate to an estate tail. Had the words been 'leaving no child,' just as clearly it would have been a fee in her with an executory devise over. Now it is a canon of interpretation, that no word is to be rejected to which a reasonable effect can be given. Upon the construction contended for in favor of an estate tail, the words 'or child' must be rejected as superfluous, for 'child' is included in the broad word 'issue,' which precedes it. But it is evident to us that the testator meant to use these two words as synonymous; to define what he meant by issue, he added, 'or child.' This is the most natural interpretation, and gives effect to every word." And see also *Taylor v. Taylor*, 63 Pa. St. 481.

In *Hall v. Chaffee*, 14 N. H. 215, where, after a devise in fee to H. C., it was provided, "that if the said H. C. should die without issue born alive of her body to heir her estate, then to have only a life estate, and after her death the premises should revert back to my estate and be equally divided between my daughters Hannah and Betsy." The Court held that the expression, "to heir her estate," showed that the failure of issue intended was definite; for, in the opinion of the Court, only issue living at the time of the first taker's death could heir her estate. The provision for the reduction to a life estate was also held to point to the same conclusion.

* 9 Watts 447.

It would seem that the Court had much better have rested its decision upon this latter ground; for it would be impossible, after the property had been held in fee for several generations, to reduce it to a life estate only, and so this reason would be conclusive, while the first mentioned reason is by no means so, or at least rests for its conclusive force on the extreme technicality of the expression "her estate" being taken as expressing merely the estate directly transmitted by the first taker, and not as meaning the land which had been held by her.

Devise on Death of First Taker Without Issue before Certain Person Named or Time Otherwise Fixed.

Where the devise over is on the death of the first taker without issue before the death of a certain person named in the will, the failure will be held definite, and the devise over good, *Hilleary v. Hilleary's Lessee*, 26 Md. 274; *Bramlet v. Bates*, 1 Sneed 554; and where the devise over is on the death of the first devisee without issue before arriving at a certain age, a definite failure of issue will be implied, *Bell v. Scammon*, 15 N. H. 381; *Lippett v. Hopkins*, 1 Gall. 454; *Dallam v. Dallam's Lessee*, 7 H. & J. 237; *Ackless v. Seekright*, Breeze 46; *Barnitz's Lessee v. Casey*, 7 Cr. 458; *Grimball v. Patton*, 70 Ala. 626; and so where the devise over is if or in case the first devisee die before he have issue, for the words assume as the very contingency upon which the estate shall go over, that the devisee shall die before he have lawful issue, and not that the issue which he may have shall fail, *Den d. Harris v. Taylor*, 5 N. J. Law 413.

Devise to a Class Debarring Certain Members thereof.

It is held that a provision in a devise over to a class debarring certain members of that class, although the members are not named and the application of the excluding clause remains to be determined by events, will be of weight in determining the failure of issue contemplated to be definite, *Middleswarth's Adm'r v. Blackmore*, 74 Pa. St. 415.

Devise "After" the Death of First Devisee Without Issue.

Where the devise over is expressed to be "after" the death of the first taker, the testator will be held to have intended a definite failure of issue, "after" being interpreted in the sense of immediately after, thereby showing that the divestiture of the fee first granted was to take place, if ever, at the time named, *Burfoot v. Burfoot*, 2 Leigh 119; *Downing v. Wherrin*, 19 N. H. 9.

Effect of Introduction of Condition of Unmarried State.

The authorities are to the effect that the introduction of the condition of an unmarried state on the part of the first taker will not cause the dying without issue, upon which the devise over is to take effect, to be regarded as definite. In *Vaughan v. Dickes*, 20 Pa. St. 509, the testator, after giving his property in fee to his son, made a devise over thereof "should my son, Peter Dickes, not marry, and have lawful issue." The Court held the devise over void for remoteness, avowedly disregarding the condition of marriage. WOODWARD, J., in delivering the opinion of the Court, saying: "As Peter could not have lawful issue unless he married, we may disencumber the sentence of the marriage condition." This case entirely overruled the exception mentioned in the dictum by SERGEANT, J., in *Eichelberger v. Barnitz*, 9 Watts 447: "Or if he [the first taker] die unmarried and without issue." From the decision of the Court, BLACK, C. J., dissented. The question was again argued in *Matlack v. Roberts*, 54 Pa. St. 148. The devise over was "in case of the death of either of my children unmarried or without issue." The Court followed *Vaughan v. Dickes*, and held that the failure intended was an indefinite one, although with seeming unwillingness; for AGNEW, J., in delivering the opinion, said: "Had it not been for the decision in *Vaughan v. Dickes*, 8 Harris 509, I would have thought the case fell within the exception stated by SERGEANT, J., in *Eichelberger v. Barnitz*, 9 Watts 450, that a devise over, the devisee dying *unmarried* and without issue, indicated a failure of issue within a definite period. But, in *Vaughan v. Dickes*, it was held (the present Chief Justice delivering the opinion) that dying before marriage indicated nothing definite in the period when the failure of issue should take place." This case was followed in *M' Cullough v. Fenton*, 65 Pa. St. 419; in which case SHARSWOOD, J., while looking upon the question as settled, said that, were it *res integra*, he should concur in the doubt expressed by AGNEW, J. The doctrine of these cases, opposed as it is to the dictum of SERGEANT, J., the dissent of Chief-Justice BLACK, and the doubts of Chief-Justices AGNEW and SHARSWOOD, may be established by authority, but it certainly seems opposed to reason. One would at first glance suppose that nothing could show more plainly than the introduction of the condition of the unmarried state at the time of death and failure of issue, that the failure intended was on the death of the first taker. Death unmarried, by the most liberal and wide construction, can mean but two things: (1) that the person named has never married, and dies a bachelor; (2) that he has married, and his wife has died before him. The former meaning is the one probably meant in all cases in which it is used. In common parlance, "an unmarried man" means

a bachelor; we speak of a widower as "a widower." Now, if a person die a bachelor, he can have no legal issue, and therefore, if the devise be taken in the first sense, the failure of issue which would in any way come within the terms of the will must be at his death, and at no other time; for the moment he marries, the contingency upon which the executory devise is to take effect becomes impossible, and the estate given thereby is defeated. This becomes more plain when we remember that the same Court which decided the above cases has also held that a good executory devise may be made on the non-marriage of the first taker. Thus, in *Griffith v. Woodward*, 1 Yeates 316, the testator made a devise over: "If either of my said sons shall happen to depart this life, unmarried and without lawful issue, that then the survivor of them is to enjoy all the estate of his deceased brother." It is true, the question of survivorship came into the cause; but the Court (SHIPPEN, C. J., and YEATES, J.), in delivering its opinion went most strongly on the ground that the testator's intent was that the sons should marry, and held that a marriage even without issue would defeat the devise over, saying: "In the will before us, the sense of the testator is clear and entire from the words he has used. He probably intended to tempt his sons to marry, and therefore subjected their lands to that condition. Would it be reasonable or consonant to their father's meaning, if either of them formed such a connection, that he should not have it in his power to make a provision for his wife in case she survived him?" And in *Jessup v. Smuck*, 16 Pa. St. 327, decided in 1851, less than two years before *Vaughan v. Dickes*, non-marriage was regarded as a good cause of defeasance. From the analogy of these cases, as well as upon general reason, it would seem that attaching the ordinary signification to the term "unmarried," the case of *Vaughan v. Dickes* is not sustainable. But taking the second and less common meaning, that a testator should mean that if the first devisee died a widower and without issue living at that time the estate should go over, is perfectly reasonable and comprehensible; and there is the case of a definite failure of issue; but in order to uphold the construction of an indefinite issue, and yet give any force to the word unmarried, we must take the testator's meaning to be, that if the first taker survive his wife, then, on failure of his issue at any time, the estate shall go over; but if the first taker should die leaving a wife, then his estate shall never go over, for the first taker would not have died unmarried. No reason for such distinction can be imagined; it is hardly to be supposed that the regard of the testator for the devisees over, or his desire to benefit them, is dependent upon the contingency of survivorship of the husband or wife, when, no matter which survives, immediate issue is left. On the whole, then, it seems to us that the rule laid down in *Vaughan v. Dickes*, while it may be binding authority in Pennsyl-

vania, should not be followed in any of those States where the question of the effect of the introduction of the condition of dying in an unmarried state is *res integra*, and that the opinion, more consonant to reason and probability, is that when the testator makes the devise over dependent upon the dying unmarried and without issue of the first taker, he intends thereby a definite failure at the time of the first taker's death.

Provision for Sale on Death of First Taker Without Issue.

Where the devise over is that, on the death of the first devisee without issue, the executors of the testator shall sell and divide the property, the failure is held to be definite, *Middlesworth's Adm'r v. Blackmore*, 74 Pa. St. 415.

Provision for Division of Land.

And it has been so held where, without any provision for sale, the will has simply been that, on the death of the first devisee without issue, the property should be divided, *Den ex d. Sinnickson v. Snitcher*, 2 Green 53; and see *De Hay v. Porcher*, 1 Rich. Eq. 266. It is true that in the last cited case, the devise over was on the death of a second devisee without issue "living at her death;" but the Court confined the failure of issue to the life of the first taker on account of a provision for division of the property at her death; but see *Heffner v. Knepper*, 6 Watts 18.

Devise Over to Survivor of a Class.

It has been sometimes sought to draw the conclusion that a definite failure of issue is intended where, in the case of a devise to certain members of a class, there is a devise over of the share of one dying without issue to the survivor, or where there are separate devises, and upon the death of one devisee the land devised to him is limited over to the other devisee. Such an intent may be readily conceded where the devise over is of a life estate; but where the devise over is in fee, the question of the effect of such devise upon the provision for the failure of issue becomes a more difficult one to determine, and we find the courts in different parts of the country coming to different conclusions.

In Virginia, it is held that such a devise will not imply a definite failure. In *Sydnor v. Sydnor*, 2 Munf. 263 (1811), the devise over ran as follows: That "if any of them [the daughters of the testator] should die without heirs of their bodies, then the parts of them so dying should be equally divided among the survivors and their heirs." An argument that a defi-

nite failure was intended, based on the use of the words "survivors," was made by counsel; but the Court held that the failure intended was an indefinite one. And see *Carter v. Tyler*, 1 Call 143, and *Bells v. Gillespie*, 5 Rand. 273. In the last case the devise was: "That if either of my said sons to whom I have bequeathed lands should die without lawful issue, that the part allotted them be equally divided among the surviving brothers." It was argued that a definite failure was intended, but CARR, J., in delivering the opinion of the Court, said: "I cannot perceive why time should be so important that he [the testator] should say to his other sons, 'Though it is my will that you have the land of P. Bell if he has no child at his death, yet, if he leave a child, you shall not have it though that child die the next hour.'" The learned Judge noticed the argument drawn from the word "surviving," and cited, *contra*, *Chadock v. Cowley*, Cro. Jac. 695; *Hope v. Taylor*, 1 Burr. 268; *Roe v. Scott*, C. P. 27 Geo. 3, 2 Fearn 209; *Barlow v. Salter*, 17 Ves. 479.

The law is held to be the same in Maryland, *Newton v. Griffith*, 1 H. & G. 111; *Jackson v. Dashiell*, 3 Md. Ch. 257. In the latter case, however, the learned Chancellor went beyond the requirement of the facts before him, and seems to have enunciated some questionable law. He said: "The words 'without issue' in a will, when applied to a disposition of real estate *ex vi termini*, mean an indefinite failure of issue, if there is nothing in the will restraining the operation of the words; and the circumstance that the limitation over is to a survivor will not have the effect to restrain the established legal meaning of the words. Now, the devise over in this case was, provided that if either or any of my said grandsons should die without issue, then the above bequest to descend and become the estate of the survivor or survivors." As the devise over was evidently in fee, the declaration of the Chancellor was clearly *obiter*, and, if the limitation for life were to a person in being, clearly erroneous.

In Pennsylvania, the law is the same as in Virginia. The question was considered as early as 1798 in the case of *Haines v. Witmer*, 2 Yeates 400; in which case there was a devise of several tracts of land to several children, their heirs and assigns, with the following declaration: "It is my will, that if either of my children should die without issue lawfully begotten, that each and every of their respective shares by me to them before devised shall be equally divided to and amongst the survivors." All the Justices, MCKEAN, C. J., SHIPPEN and YEATES, JJ., were of opinion that the failure of issue implied was indefinite. SHIPPEN, J., said, after citing *Pells v. Brown*, Cro. Jac. 590: "It is contended that although in the principal case there are no express words to restrict the devise to the dying without issue in the lifetime of the second devisee, yet there are words

which equally manifest the intention of the testator to be such. This construction is drawn from the words, 'equally to be divided amongst the survivors.' The word 'survivors' in the plural number, it is said, evidently shows the meaning of the testator to be, that the devise over should not take place unless more than one of his other children should be living at the time of the death of Daniel without issue, and is equivalent to saying, 'If Daniel should die without issue living, to Samuel, Isaac, Jacob, and Hannah, his other children, or any of them' There are not wanting cases in the books of devises with limitations to survivors after the words, dying without issue. In the case of *Wilson v. Dyson*, in Sir Tho. Raym. 426, where the devise was to his third son and his heirs forever; but, if he die without issue, the remainder of his estate to be divided among his sons and daughters and the survivors of them, it was adjudged an estate tail. In *Chadock v. Cowley*, Cro. Jac. 695, the words, 'I will that the survivors of them shall be heir to the others,' were adjudged an estate tail. In *Roe v. Scott et al.*, 2 Fearn 203, the words were: 'If either of my three sons should depart this life without issue of his or their bodies,' then the estate or estates of said sons shall go to the survivors or survivor; and it was adjudged an estate tail.

"The distinction made in the present case, founded upon the word 'survivors,' in the plural number, is, I fear, too refined. As to the intention of the testator, it affords no more room for the construction contended for than if it had been in the singular number 'survivor.' The remote consequences may be different, but probably the testator had them not in contemplation." Later, the same subject came before the Court for consideration in the case of *Caskey v. Brewer*, 17 S. & R. 441. In that case there was a devise to the daughters of the testator, their respective heirs and assigns, to which was added, "it is my will that if either of my said three daughters die without issue, that then the share of the said daughter shall go to and vest in the other two daughters, if living, or in the daughter surviving, and the children of any of the deceased daughters; and if two of my daughters die without issue, the third living, that then the survivor shall take the share of both the deceased; or if any of my daughters die, leaving children, the said children to take the same estate as their mother would have taken had she been alive." The plaintiff in error urged that a definite failure was intended, and that therefore the devise made an estate in fee subject to an executory devise, and not an estate tail. But the Court held otherwise, and regarded the construction as settled in Pennsylvania, that such a devise imported an indefinite failure of issue. In *Heffner v. Knepper*, 6 Watts 18, the same question was presented. The testator had devised all his real estate to his six sons, and pro-

vided that should any of his sons die without lawful issue, "then is such a one's portion to be divided amongst their living brothers and sisters." The Court held the failure to be indefinite, SARGEANT, J., after citing *Haines v. Wilmer* and other authorities, saying: "These decisions may be considered as having established a rule of property under which many titles to real estate are held, and which it is of the first importance should be preserved uniform and stable, as well for the security of property held under it, as for furnishing a guide to the ascertainment of title in future." And see *Sharp v. Thompson*, 1 Whart. 139.

It may be noted, however, that in *Johnston v. Currin*, 10 Pa. St. 498, where there was a devise as follows: "If any of my daughters die without heirs of the body, their part to be equally divided between the survivors of them and my grandchildren," the Court held that a definite failure was intended; and COULTER, J., in delivering the opinion, made quite an assault upon the rule of indefinite failure, and rested the decision on the force of the provision for survivors, saying: "Thus Mr. Walker, the testator, using the common language of the country, provided that if his daughter Jean should die without heirs of her body, her share should go to her surviving sisters, and the children of James Walker and Mrs. Stewart, who were his grandchildren, he must have meant that if she had no heirs of her body when she died, her share should go to her surviving sisters and to his grandchildren. That was the point of time, the death of either of his daughters; for if it was not, how could it survive to the *other daughters* and to the grandchildren? If the failure of issue was to happen by an extension of the time at any future period of indefinite duration, how could it be limited to persons then *in esse*?" The authority of this case is, however, questionable; it is true, STRONG, J., cites it in *Bedford's Appeal*, 40 Pa. St. 18, without comment, but *Bedford's Appeal* was a case of personal estate; and, on the other hand, see the remarks of LOWRIE, J., in *Middleswarth v. Collins*, 1 Phila. 139: "If I have understood the case of *Johnson v. Currin*, the learned Judge has put it entirely upon the intent of the testator, without giving proper weight to the principle that *consistency with the rules of law* is always an element in that canon of construction, and that there are rules of law for *arriving* at the intent, and some that control and frustrate the most manifest intent;" which language is quoted with approbation by the Common Pleas, in *Criley v. Chamberlain*, 30 Pa. St. 161, in an opinion which was adopted by the Supreme Court, and in *Currin v. McMeen*, 55 Pa. St. 487, wherein the same will was under consideration by the Court. READ, J., in delivering the opinion, said: "But the case of *Johnson v. Currin* is not of unshaken authority. Judge Linn's observations upon it in his Appendix, p. 726, and the unshaken series of later decisions,

establishing such language as is used in these clauses to create an estate tail in Jean Johnson, would lead us to think that the law as expounded in 10 Barr is not perfectly sound." And see *Amelia Smith's Appeal*, 23 Pa. St. 9; *McCullough v. Fenton*, 65 Id. 419.

In New York, the question has been fully considered, and, in spite of the strong dissent of Chancellor KENT, the law has been, from early times, held differently from what it has been held to be in most jurisdictions. The earliest reported case in which the question was considered is *Fosdick v. Cornell*, 1 Johns. 440, which was decided by the Supreme Court in 1806, and a devise over to survivors was held to be valid as upon a definite failure of issue. The words of the will read as follows: "Further, my mind and will is, that if any of my said sons, William, Jacob, Thomas, and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, that then the lands shall return to the survivors, to be equally divided between them." The opinion of the Court was delivered by THOMPSON, J., who, after citing *Pells v. Brown*, Cro. Jac. 590, and stating *Hughes v. Sayer*, 1 P. Wms. 534, said: "This was held a good devise over, for the words 'dying without children' must be taken to be children living at the death of the party, and could not mean an indefinite failure of issue; and the reason assigned was, that the immediate limitation over was to *surviving devisees*; and it was not probable that if either of the devisees should die leaving issue, the survivor would live so long as to see a failure of issue, which, in notion of law, was such a limitation as might endure forever.

"If the reason assigned for the decision in the case is solid, it applies in its full force to the one before the Court; for here the limitation over is to the surviving devisees. The only difference between the two cases is that the one relates to personal and the other to real estate, which it is contended requires a different rule of construction, according to the adjudged cases. I find no distinction, however, with respect to the effect which the words 'surviving devisees,' or any other words or parts of the will, are to have in ascertaining the intent of the testator." *Fosdick v. Cornell* was avowedly followed in *Jackson ex d. Burhans v. Blanshan*, 3 Johns. 292; but the decision in that case can be sustained upon another ground, for the devise over was to take place if the testator's children [the first takers] should die before arriving at full age without lawful issue. The same case came again before the Supreme Court, in 6 Johns. 54. *Fosdick v. Cornell* was also followed in *Jackson ex d. Staats v. Staats*, 11 Johns. 337. The question came, in 1819, before the Court of Errors, in the case of *Anderson v. Jackson ex d. Eden*, 16 Johns. 382, and was there considered at great length. The case arose upon the will of Medcef Eden, which gave

rise to so much litigation in the State of New York. The will made devises to the sons of the testator, to Joseph and his heirs forever, and to Medcef and his heirs forever, and "if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths without lawful issue, to John Eden." The case was very fully argued, and an energetic attempt was made to overthrow *Fosdick v. Cornell*. KENT, Ch., was of opinion that the failure should be held indefinite, and, after a most learned review of the English decisions, said: "But if these decisions have been as settled and uniform as I have stated, it may be asked, how came the Supreme Court to make such a decision as that under review? I answer, that the present case was decided without going into any discussion of the merits, and by a reference merely to one or two former cases in the Supreme Court, all of which rested upon the case of *Fosdick v. Cornell* (1 Johns. Rep. 440), decided by that Court in August, 1806. I was at that time Chief Justice of the Supreme Court; and, though I did not give the opinion, I will not shelter myself under that silence. I am free to say that I partook of its error. But I should be unworthy of public confidence if, with more experience and more examination, having detected myself in an error, I should now be ashamed to confess it. I discovered years ago that the case of *Fosdick v. Cornell* was decided upon mistaken grounds. The Court, however, have this apology for themselves, that without much examination, and without looking as they ought to have done deeply into the subject, they were led astray out of the beaten track by such a distinguished leader as Lord KENYON. The cases of *Porter v. Bradley* (3 Term Rep. 143) and of *Roe v. Jeffery* (7 Term Rep. 589), were the blind guides that misled them. I say this confidently, for the Court do nothing more in the whole opinion than repeat what Lord KENYON had spoken." The Chancellor, after pointing out that, as *Porter v. Bradley* was decided in 1789, it was not authority in this country, and showing Lord KENYON's subsequent inconsistency, considered the American authorities, citing, among other cases, *Richardson v. Noyes*, 2 Mass. 56; *Ray v. Enslin*, Id. 554; *Ide v. Ide*, 5 Id. 500; *Hauer v. Shitz*, 3 Yeates 205; *Royall v. Eppes*, 2 Munf. 479; *Hunter v. Haynes*, 1 Wash. (Va.) 71; *Den ex d. Sutton v. Wood*, Cam. & Nor. 202, and concluded his survey of the authorities as follows: "I have now finished a review of the material decisions in England and the United States on the great question before us, and it appears to my humble judgment that no point of law was ever more completely established, and better fortified by all that is venerable in authority on each side of the Atlantic." The Chancellor was therefore in favor of reversing the judgment of the Supreme Court, and overruling *Fosdick v. Cornell*. With him nine sena-

tors concurred, HAMMOND, Sen., delivering a concurring opinion. But a majority of the Court voted to sustain the Supreme Court, the opinion being delivered by YATES, J., who said: "I hold it to be a well settled rule of construction, that the terms used in a will are to be understood in their popular sense, unless opposed to some rigid, unbending rule of law. Now, no one can hesitate for a moment as to the meaning of the testator in the case before us. He clearly intended that if either of his sons should die without lawful issue, the survivor should take the whole, which was devised to both, and the only question is, whether there is any inflexible, rigid rule of law to wrest the plain and manifest intention of the testator to a purpose altogether different from what he intended. I am unacquainted with any such rule, nor do I consider the cases cited, when collectively taken, to establish such a position. But if there are any such cases, let it be remarked that the policy and genius of the British government are in some respects opposed to our own; they encourage and support estates tail as being important in forming family settlements; they always lean in favor of the eldest son as heir at law, and to oust the devisee they invariably incline to maintain some of the features of a feudal monarchy, and the wealth and dignity of an overgrown nobility. On the contrary, it is the policy and genius of our republican institutions to consider all the children of a parent as placed on an equal footing, and to discountenance an aristocracy of wealth and influence." Then, after citing and quoting the New York cases, the opinion concluded as follows: "I am unwilling, for one, to interfere too much in disturbing titles to real property which may have been acquired under the repeated and solemn decisions of the Supreme Court; more especially when such efforts are made to counteract the plain justice of the case, and the manifest and decided meaning of the parties."

This case settled the law in New York, and accordingly we find in *Cutter v. Doughty*, 23 Wend. 513, COWEN, J., saying that the word "survivors" qualifies the technical or primary meaning of the words "dying without issue," being considered the same as if the testator had added, living at the time of his death; and see *Lion v. Burtiss*, 20 Johns. 483; *Wilkes v. Lion*, 2 Cow. 333; *Lovett v. Buloid*, 3 Barb. Ch. 137; *Wilson v. Wilson*, 32 Barb. 328; *Vedder v. Evertson*, 3 Paige 281.

The law seems to be settled in the same manner in Arkansas. The question was there very fully discussed in *Moody v. Walker*, 3 Ark. 147; in which case the arguments of counsel, especially that of Mr. Pike for the appellant, are very noteworthy for their exhaustive citation and elaborate examination of authorities. The case, it is true, involved a chattel; but the opinion of the Court made no distinction between the two kinds of property, and

may be regarded as settling the rule with regard to both. LACY, J., in delivering the opinion, said: "From all these authorities we conclude that the term surviving one is a term of much import; and the better opinion seems to be that it carries with it the idea of the longest liver at the death of the first taker, and that it means a definite failure of issue."

In New Jersey, in the earliest reported case upon the subject, *Den ex d. Secquil v. Moore and Drayton*, Coxe 386, decided in 1795, it was held that a devise over to a survivor would not render the failure of issue definite. This case was affirmed on appeal; but in 1824, in *Den ex d. Van Middlesworth v. Schenk*, 3 Hals. 29, the Court held that the following devise imported a definite failure. After a devise to several children, the will continued: "If any of my children shall happen to die without issue alive, that such share or dividend shall be divided by the survivors of them." It is true, that force was given to the word "alive;" but FORD, J., said: "If more were needed to show that dying without issue alive meant alive at his death, and not an indefinite failure or estate tail, an additional argument would be found in the limitation to survivors. The limitation does not express that the survivors shall take in fee, or tail, or how otherwise, but is to the survivors simply; therefore, as the law stood at the date of the will, they could take the property only for their lives. Can it be believed that a life estate or personal benefit was intended to commence after an indefinite failure of issue, which might not happen within a century?" And see *Den, Nelson et ux. v. Coombs*, 3 Harrison 27. In 1842, the question was quite fully argued in *Den ex d. Wardell v. Allaire*, Spen. 6. In that case the devise over was "in case either of my sons before mentioned should die without issue, that his share be equally divided between my surviving sons." The Court held that the case in Coxe's Reports had been overruled by *Den v. Schenk*, and after citing the New York cases and *Porter v. Bradley*, held that the use of the word "surviving" in the devise over determined the failure of issue to be definite. This case may be said to have settled the law in New Jersey to be in accord with the doctrine of *Anderson v. Jackson*.

In Connecticut, a devise to survivors is apparently given the force of causing the devise over to be interpreted as on a definite failure. In *Couch v. Gorham*, 1 Conn. 36, the devise over on the death without issue of any son of the testator was "then and in such case the share or part given to such deceased son shall go and vest in his surviving brethren, or those that legally represent them." It was held a good devise over. This case would seem to go very far, for the argument drawn from the presence of a devise over to a survivor is this:—If the survivor is to take, as he is living at the time the will goes into effect, the devise must take effect as to him within a life in being, viz., that of the survivor himself; but when are added, as capable

of taking the devise over, the legal representatives of the survivor, who might be in existence centuries hence, the whole argument vanishes.

In Massachusetts, the question was for a time uncertain. *Richardson v. Noyes*, 2 Mass. 56, has been cited by the Supreme Court of the United States as showing an adherence to the law as stated by the cases denounced by Chancellor KENT as blind guides, viz., *Roe v. Jeffery* and *Porter v. Bradley*; but in that case, it is to be noted, the limitation over was not only to survivors, but was on the death of the first taker "without children," which we have seen implies a definite failure; and in *Parker v. Parker*, 5 Metc. 134, a devise to the sons of the testator—"and if any or either of my said sons should die before they arrive to the age of twenty-one years, or should die without any legal heir of their body, then and in that case their share or shares shall descend equally to their surviving brother or brothers"—was held to give estates tail with cross remainders. In 1856, the question came before the Supreme Court of the United States in a case arising in Massachusetts, *Abbott v. The Essex Co.*, 18 How. 202. The phraseology of the devise over was as follows: "If either of my said sons . . . should happen to die without lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs." The Court held that the devise over was upon a definite failure, GRIER, J., saying: "The person to take on the happening of this contingency is precisely described, 'the other survivor.' It is true, that cases may be found which decide that the term 'survivor' does not of itself necessarily import a definite failure of issue, and no doubt there are many cases where it would be necessary to disregard the obvious import of this term in order to carry out the general intent of a testator otherwise apparent; but a large number of English and nearly all the American cases acknowledge the force of this term as evidence of the testator's intending a definite contingency. The other words of this clause, connected with it, clearly describe a definite contingency, and the individual who is to take, on its happening, the share of him who shall first decease without heirs shall accrue to 'the other survivor' on the death of one, the other is to take—a definite contingency and a definite individual." It may be objected that this case is not authority as to the law of Massachusetts upon the point in question, because the words quoted seem to put the interpretation upon the whole tenor of the will and not upon any special weight given to the word "survivor," or its equivalent, considered as having any technical force, because the limitation over was of both personalty and realty, and the Court was of opinion that, as the testator could not have intended an indefinite failure as to the personalty, he would not be held to have used the same words in different senses with regard to the different kinds of property, and lastly, because in cases

of interpretation of wills, the Federal courts do not consider themselves bound by the rule of construction of the State courts, unless it has been so long acquiesced in as to constitute a rule of property. See *Lane v. Vick*, 3 How. 464.

But the law seems to be settled in accordance with the opinion of the Supreme Court of the United States by the case of *Brightman v. Brightman*, 100 Mass. 238; where, after a devise to D. and J., the will continued: "If the said D. and J. shall decease, leaving no issue of his body lawfully begotten, then what I have here given and devised to such one, I here devise to the survivor and his heirs." It will be noticed that in Massachusetts, as well as in Connecticut, the presence of words of inheritance has not been allowed to destroy the effect attributed by the courts of those States to a devise to a survivor.

In South Carolina, in *Andrews v. Roye*, 12 Rich. 536, a devise over to a survivor passed apparently without question; the effect of the word "survivor" was, however, very fully considered in two quite late cases, *Mendenhall v. Mower*, 16 So. Car. 303,—in which SIMPSON, C. J., went into a learned examination of the authorities,—and in *Mangum v. Piester*, Id. 317. In the latter case, the Court laid down the law as follows: "There is a class of cases in our reports in which it is held that when the limitation over can be construed as a personal benefit alone to a party named, then the effect of such construction will operate as a restriction upon the generality of the phrase. And the term 'survivor,' when unaccompanied with words indicating a transmissible interest should the survivor not be in being at the happening of the contingency, will generally have this effect. . . . But when the limitation also embraces a transmissible interest, even the term 'survivor' will be impotent to this effect."

In Tennessee, a limitation over to "surviving ones" has been held to restrict the force of the expression "dying without issue," *Lewis v. Clairborne*, 5 Yerg. 369. This was the opinion of the majority of the Court (HAYWOOD and WHITE, JJ.); EMERSON, J., dissented.

Effect of Devise Over to Person *in esse*.

It has been sometimes sought to draw the conclusion that a definite failure of issue is intended, from the fact that there is a devise over to a person who is *in esse* at the time the will goes into effect; and it has been very frequently so held. This would seem most reasonable where the devise over is of a life estate, *Ide v. Ide*, 5 Mass. 500; *Simonds v. Simonds*, 112 Mass. 157; *Tator v. Tator*, 4 Barb. 431; *Wilson v. Wilson*, 32 Barb. 328; but there are authorities contra: see *Newton v. Griffith*, 1 H. & G.

111; *Hoxton v. Archer*, 3 G. & J. 199; *Watkins v. Sears*, 3 Gill 492. The argument in *Newton v. Griffith*, upon which the other cases rest, while it is very strong so far as it is directed against an interpretation which would give to such devise over the effect of confining the failure of issue to a failure at the death of the first taker, is wanting in force when directed against an interpretation which would hold the failure a definite one in a more enlarged sense; and, as where a life estate is expressly given to the devisee over, if it take effect at all, it must take effect in the lifetime of the life-tenant, if such devisee for life be *in esse* at the time that the testator's will goes into effect the devise over must necessarily take effect, if at all, within a life in being, within the meaning of the rule against perpetuities. It is submitted, therefore, that on all principles of reason as well as authority, whether we call the devise over a devise on a technical definite failure or not, an executory devise for life to a person *in esse* at the time of the testator's death should be held a well limited executory devise.

Where the devise over is either in general terms, or is expressly in fee, the better opinion is that the ordinary force of the words "dying without issue" will not be controlled by such a devise. The matter was learnedly considered by M'COUN, V. C., in *Ferris v. Gibson*, 4 Edw. Ch. 707. In that case, the testator, whose will antedated the Revised Statutes, made a devise to his granddaughter, and continued: "And in case my said granddaughter shall die without leaving lawful issue, then . . . to my daughters, Ann, Eliza, and Sarah, their heirs and assigns forever." The learned Vice-Chancellor said: "The naming of his three daughters as the persons to take, it is said, does show that such [*i. e.*, definite failure of issue] was his [the testator's] meaning, because it is unreasonable to suppose that the testator looked forward to a more remote event than the death of his granddaughter, when three of his daughters should take; and the case of *Roe v. Jeffery*, 7 T. R. 589, is cited as bearing on this point. But it will be seen, by looking into that case, that the gift over was of life estates only as well as to persons in existence, and that circumstance Lord KENYON deemed a sufficient indication of an intent to confine the failure of issue to the death of the first taker. In the will in question the gift over is not of life estates or of any particular estate to his three daughters, as if he supposed it at all probable they would personally enjoy the benefit of the gift; but, on the contrary, the gift to them is on the most enlarged and general terms as tenants in common in fee, as if he expected their heirs and assigns at any future time, however remote, to take whenever there should happen to be a failure of issue of his granddaughter. There is nothing in the will, therefore, to take it out of the rule, which had become fixed and firmly established as a technical rule of the common law by a

long line of judicial decisions upon the words 'dying without issue,' or 'dying without leaving issue,' as meaning an indefinite failure of issue, and therefore too remote to found even an executory devise. In the revision of our statutes this rule of construction has wisely been changed and rendered much more agreeable to reason and common sense, 1 R. S. 724, § 22. But the statute, however, is inapplicable to wills which were in force before it was adopted." And see *Hollett's Lessee v. Pope*, 3 Harring. 542; *Hunter v. Haynes*, 1 Wash. (Va.) 71; *Carr v. Porter*, 1 Hill Ch. 60; *Lyon v. Walker*, 8 Rich. 307; *Mangum v. Piester*, 16 So. Car. 317; *Tator v. Tator*, 4 Barb. 431; *Watkins v. Quarles*, 23 Ark. 179; *Doe ex d. Brantley v. Whitaker*, 5 Ired. L. 225; *Den ex d. Weatherly v. Armfield*, 8 Id. 25; *Hallowell v. Kornegay*, 7 Id. 261; *Goodrich v. Harding*, 3 Rand. 280. In *Curry v. Sines*, 11 Rich. 489, there was a devise that if the first taker should die without heirs lawfully begotten of her body, that then the said land shall descend to her sister Judith's children in common. The Court (O'NEALL, J., dissenting) held that the devise over was on an indefinite failure of issue.

Turner v. Ives, 5 Heisk. 222, seems to contravene the general current of authority; in that case the devise was: "I give to my son, J. M., in trust, for the sole use and benefit of my daughter, S. E., and to her children, if she should have any . . . and should my daughter, S. E., die without children, then to the children of the devisor." This case may be sustained without holding that a general devise over to persons *in esse* necessarily implies a definite failure of issue; for, in addition to the devise over to the children of the devisor, the devise over was on the contingency of the death of the first taker without children; but in *Morgan v. Morgan*, 5 Day 517, where the devise was: "And also my will is that if my sons, or either of them, should die without children, that his brothers shall have his part in equal proportions," the Court expressly denied that the provision for death without children caused the devise over to be upon a definite failure of issue, but held that the devise over to "his brothers" had that effect.

Devise Over to Heirs of First Taker.

In *Bell v. Scammon*, 15 N. H. 381, it was held that where the limitation over was to the heirs of the first taker, a definite failure would be intended, on the ground that the heirs were ascertainable only on the first devisee's death. The devise was to James in fee, and if he should die before reaching twenty-seven years of age, and have no male issue, then one-third of the estate to each of his two daughters, and the remaining third to his heirs. The Court held the devise over good, GILCHRIST, J., saying: "Who his heirs might be must be determined at his death. That then

is the period to which the testator refers. It might, indeed, be said that the period for ascertaining who his heirs might be, was after all his descendants should become extinct. But this is not so obvious, or so rational an exposition of the will as the other construction; for, in order to adopt it, we must disregard the first class of heirs entirely, and the first period when the devisee can be said to have heirs in a legal sense, although they answer all the requirements of the will." It is submitted that in this case the Court went further than the requirement of the facts of the cause, for the failure of issue would seem to be sufficiently limited by the provision that the failure should take place before James arrived at the age of twenty-seven.

Devise Over Subject to Payment to Persons *in esse* at Testator's Decease or when Time is Fixed for Doing Certain Thing.

Where the devise over is made subject to the payment of certain sums to persons living at the time of the testator's decease, the failure of issue will be held definite, *Hill v. Hill*, 4 Barb. 419; and so, where, in case of failure of issue, a certain thing is to be done within a given time from the death of the first taker, as in *Theological Seminary of Auburn v. Cole*, 18 Barb. 360, where the devise was to C. H., her heirs and assigns, and if she should die without issue, ten thousand dollars to be paid to the Theological Seminary, in four annual payments, after the death of C. H.

Devise after Fee Conditional in South Carolina.

In South Carolina, it is held that there can be no executory devise over after a fee conditional, *Bedon v. Bedon*, 2 Barb. L. 231, *Masyck v. Vandendorst*, 1 Bail. Eq. 48, *Adams v. Chaplin*, 1 Hill Ch. 268, *Horry v. Deas*, 2 Hill Ch. 244, *Buist v. Dawes*, 4 Strobb. Eq. 37, for the reason, as given in *Bedon v. Bedon*, that such a limitation over would be after an indefinite failure of issue; but another reason may, we think, be found in the fact that the statute *de donis* was never in force in South Carolina, and therefore as soon as issue was born, the absolute fee, with power of disposition, became vested in the tenant.

Devise to Class Debarring Certain Members.

A devise over to a class, debarring from participation in the benefits thereof certain members of the class who should be guilty of certain offences, has been held to show that the failure of issue, upon which the

devise over is made, is a definite failure, *Middleswarth's Admin'r v. Blackmore*, 74 Pa. St. 415.

Statutory Change of Rule as to Definite Failure of Issue.

Before leaving the question of the effect of a devise over on failure of issue in determining the character of the failure intended by the testator, it must be noted that in several States the rule of construction has been changed by statute, and that consequently in such States, and in wills dated subsequently to the passage of the statutes, the statutory construction will prevail. The statutes are of two classes; the first consisting of those which imperatively say that in the case of limitations over "to take effect on the death of any person without heirs, heirs of the body, or issue, the words heirs, heirs of the body, or issue, shall be construed to mean heirs, heirs of the body, or issue, living at the death of the person named as ancestor." The language quoted is that of the New York Revised Statutes (omitting the word remainder and supplying limitations over; for, as we have seen, the word remainder has lost all distinctive force in the New York statutes, and is equivalent to future estate), concerning which Chancellor KENT, in the fourth volume of his Commentaries, at page 280, says: "The statute speaks so peremptorily as to the construction which it prescribes, that the courts may not, perhaps, hereafter feel themselves at liberty to disregard its direction, even though other parts of the will should contain evidence of an intention not to fix the period of the devisee's death for the contingency to happen, and that the testator had reference to the extinction of the posterity of the devisee, though that event might not happen until long after the death of the first taker. They might be led to regard any such other intent, collected from the whole will, if such a case should happen, not to be consistent with the positive rule of construction given by the statute to the words *heirs* and *issue*. Yet, when we consider the endless discussions, and painful learning, and still more painful collisions of opinions, which have accompanied the history of this vexatious subject, it is impossible not to feel some relief, and to look even with some complacency at the final settlement, in any way, of the litigious question by legislative enactment." One can heartily sympathize with the great lawyer whose words we have quoted, in almost any expression of relief at being delivered from the necessity of considering the conflict of authority existing upon the subject, and the careful scrutiny of the expressions of testators, but it will be observed that statutes of this class simply substitute for one arbitrary interpretation another still more arbitrary, in that the courts are not permitted to uphold a testator's intent when there is evidence in the will which would overthrow the *prima facie*

force of the words. In all probability, in most cases, a testator using the words "if he die without issue," does mean what the New York statute says he *shall* mean, but in some cases he may not; that class of statutes, therefore, which merely shifts the presumption, and places the burden of proof on those alleging that the failure intended is indefinite, seems more consonant to justice, and certainly to that principle of law which has always favored the intention of a testator.

Statutes of the first, or peremptory class, exist in New York; see Rev. Stat. (1882), Pt. 2, Ch. 1., Tit. 2, § 22, p. 2177; Michigan, Hornell's Ann'd Stat., § 5538, p. 1443; Minnesota, Rev. Stat., Ch. XLV., § 22, p. 562; Wisconsin, Rev. Stat., § 2046, p. 615; Alabama, Code, § 2181, p. 571; Missouri, Stat. 1845, Rev. St., § 3942, p. 675; see *Wead v. Gray*, 8 Mo. App. 515.

In the following States the statutes are of the second class, or those in which the presumption is changed, and the burden of proof merely is shifted by enactments that the words, "dying without heirs, or heirs of the body or issue," shall be construed to mean a failure of issue at the time of the death of the person named as ancestor, unless a different intent be plainly expressed, or in the absence of an intent to the contrary appearing: Virginia, Stat. of 1819, Code, Ch. 112, § 10, p. 889; Mississippi, Stat. of 1824, Rev. Code (1880), § 1203, p. 347; see *Busby v. Rhodes*, 58 Miss. 237; North Carolina, Stat. of 1827, Batt. Rev. Ch. 42, § 3, p. 383; South Carolina, Stat. of 1853, Gen. Stat. (1882), § 2275, p. 649; Tennessee, Stat. of 1852, Stat. (1871), § 2009, p. 938; Maryland, Stat. of 1862, Rev. Code (1878), Art. 49, § 9, p. 420; West Virginia, Rev. St., Ch. 82, § 10, p. 553; Kentucky, Gen. Stat. (Bull. & Fel.), Ch. 63, Art. I., § 9, p. 586.

The English Act on the same subject, 1 Vict., c. 26, § 29, p. 491, is as follows: "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being (without any implication arising from such words) a limitation of an estate tail to such person or issue, or otherwise; provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Devise after Death of Issue of a Person Named.

A devise over after the death of the issue of a person named and in being is too remote. See *Donohue v. M' Nichol*, 61 Pa. St. 73. In that case there was a devise over after the death of the "lawful issue of my son John." John being alive at the taking effect of the will, the devise was regarded as void. In *Sears v. Russell*, 8 Gray 86, there was a devise to the trustees for the use of Mary Ann Shaw, and on the decease of Mary Ann to transfer to her children or their representatives, and on default of issue *then living* to transfer the property to the heirs-at-law of the testator. The will showed an intent to exclude the father of Mary Ann's children from any interest in the estate. The Court held the devise over void for remoteness; BIGELOW, J., who delivered the opinion, saying: "The limitation was not upon a life in being, with twenty-one years superadded, but upon a life in being and after its termination upon a life or lives not in being at the time of the testator's death, and which might continue fifty years or more after the expiration of the life of the first taker. Indeed, the gift over could not take effect within the prescribed period as to the share of any children born after the testator's death, unless it died within twenty-one years after its mother."

Concurrent Alternative Limitation after a Precedent Estate, or where Possession is Otherwise Postponed.

Where there are two concurrent or alternative limitations preceded by a life or other partial interest, or where the enjoyment under them is otherwise postponed, the rule is to apply the words "dying without issue" to the event of death occurring before the period of possession or distribution, 2 Jarman on Wills 693, 694. In *Vidal v. Verdier*, Speer's Eq. 402, there was a devise to the wife of the testator for life, and after her death to J. T. Vidal; "but in case of the death of J. T. Vidal without leaving a lawfully begotten child or children, to be divided amongst the nephews and nieces of the testator; in case Vidal leave children, the property to be divided among them, and in case of the death of one of said children without his or her leaving a lawfully begotten child or children, his or her portion shall be divided between the remaining child or children; but in case of the death of each and every child without their leaving behind them a lawfully begotten child or children, then the estate, both real and personal, shall be divided among my other nieces and nephews, share and share alike, and if they be dead their children." The Court held that the limitations subsequent to that to Vidal were contingent limitations to be referred to the death of the tenant for life, and were substitutionary de-

vises. This case was thus explained in *Yates v. Mitchell*, 1 Rich. Eq. 265, by HARPER, Ch.: "That case was decided on this principle, that when a testator giving in remainder after an estate for life uses one set of expressions denoting that the remainderman is to take an absolute estate, and another set of expressions limiting it to an estate for life, with remainders to his issue and a limitation over in the event of not having issue; this apparent repugnancy may be reconciled by restricting the dying without issue to the lifetime of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the lifetime of the tenant for life, leaving issue, the issue will take as purchasers under the will; if without issue, the limitation over will have effect; but if he survives the tenant for life, the estate is absolute. Such is in every case a reasonable and probable intent, and in that case there were circumstances to satisfy me very fully that such was the actual intention." In *Bailey v. Ross*, 66 Ga. 354, there was a devise to the testator's wife and children, with a provision that the estate should be kept together during the life or widowhood of the wife, or until one or more of the children married, and that on the death of the widow the property should be divided, followed by a clause in the following words: "And in the event any of my children should die without issue living, or if leaving issue such issue should die under twenty-one years of age, then the portion of such child or children shall be equally divided among my surviving children." It was held that the failure of issue intended must be confined to a failure in the lifetime of the widow and that children surviving her took absolute estates. And see also *Blum v. Evans*, 10 So. Car. 56; *Bartlett v. Bartlett*, 33 Ga. Suppl. 173. In *Ferson v. Dodge*, 23 Pick. 287, there was a devise to a wife for life, and afterwards to Nehemiah Dodge and his heirs, of all the testator's real estate, "he to come into possession of two-thirds thereof at my wife's marriage, and the other third thereof at her decease. But if my said kinsman shall die before he come into possession of the estate, then over." It was held that the second devise over was held good, and could be sustained either as an alternative limitation or, if regarded independently, as a devise which must take effect within the time allowed by the rule against perpetuities.

Double or Alternative Contingency.

Where the devise over depends upon an alternative contingency or upon either of two contingencies, one of which may be too remote and the other cannot be, the devise will be held valid, *Jackson v. Phillips*, 14 Allen 572; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Fowler v. Depau*, 26 Barb. 224.

Executory Devise Exempt from Power of Owner of Preceding Estate.

As we have seen, an executory devise is wholly exempted from the power of the owner of the estate which precedes it, *Downing v. Wherrin*, 19 N. H. 9; *Jackson ex d. Brewster v. Bull*, 10 Johns. 19.

His conveyance will not affect it, even although he assume to convey the whole fee, *Couch v. Gorham*, 1 Conn. 36; *Hilleary v. Hilleary's Lessee*, 26 Md. 274; and while the first taker may legally alien his fee or other estate, his grantee will take only the same estate as that of his grantor, namely, a fee, or other estate, subject to defeasance on the occurrence of the same contingency to which it was subject in the hands of the first taker, *Parker v. Parker*, 5 Metc. 134; *Smith v. Hunter*, 23 Ind. 580; *Den ex d. Sutherland v. Cox*, 3 Dev. L. 394.

Even where the first taker suffers a common recovery or levies a fine, the devise over will not be affected, *Jackson ex d. Brewster v. Bull*, 10 Johns. 19; *May v. Hill*, 5 Litt. 509; *Downing v. Wherrin*, 19 N. H. 9; *Nunally v. White*, 3 Met. (Ky.) 588. From this rule there must be made an exception, namely, where the first estate is an estate tail. Ordinarily, of course, we do not have the case of an executory devise upon an estate tail, for if the devise over is to take effect after an estate tail, it is void as upon an indefinite failure; but we may have a devise over upon a contingency other than the failure of issue, which may defeat an estate tail, and in such case it is thought that it will be in the power of the first taker to defeat the devise over, for the right to suffer a common recovery is so intimately connected with an estate tail as incident thereto, that the estate cannot be shorn of such right without ceasing to be an estate tail. This position is supported by *Taylor v. Taylor*, 63 Pa. St. 481, in which case SHARSWOOD, J., said: "An estate tail may, no doubt, be subject to an executory devise over on some condition or event, to take effect in abridgment or derogation of it, 1 Preston on Abstracts 401; though such an executory devise can be destroyed by a common recovery suffered by the tenant in tail, which enlarges his estate into a fee and excludes all subsequent limitations, whether in remainder or by way of springing use or executory devise, 2 Preston on Estates 460; 1 Preston on Abstracts 401; 3 Id. 130; 4 Kent's Com. 13."

Where there is an executory devise over to the person who is the heir at law of the first taker, and the latter makes a deed of the land with warranty, and the warranty descends without assets from the first taker on the executory devisee, the devise will not be thereby barred, *Doe ex d. Myers v. Craig*, Busbee Law 169; reversing *Spruill v. Leary*, 13 Ired. Law 401.

A sale of the land devised upon execution against the first taker will not affect the right of the executory devisee, *Den ex d. Sutherland v. Cox*, 3 Dev. Law 394.

The right of the executory devisee cannot be affected by the running of the Statute of Limitations during the continuance of the first taker's estate, *Nunally v. White*, 3 Met. (Ky.) 588.

Effect of Lapse of Preceding Estate.

An executory devise is not affected by the lapse of the first estate unless the events upon which the estate is to shift from the first devisee are such as may happen as well in the testator's lifetime as afterwards, and the first devise lapse by the first devisee's death in the deviser's lifetime under circumstances which, had they happened after the testator's decease, would have vested the property in the devisee to the exclusion of the executory or substituted devisee, in which case the executory limitation is defeated, *Mathis v. Hammond*, 6 Rich. Eq. 121; *Evans v. Godbold*, 6 Id. 26; *Schoppert v. Gillam*, Id. 83. And see *Lessee of Thompson v. Hoop*, 6 Oh. St. 480.

Executory Devise when Descendible or Devisable.

An executory devise is descendible if it is a devise of a transmissible interest, *Ackless v. Seekright*, Breese 46; *Smith v. Hunter*, 23 Ind. 580; *Lessee of Thompson v. Hoop*, 6 Oh. St. 480; *Kingland v. Leonard*, 65 How. Pr. 7; *Den ex d. Manners v. Manners*, Spen. 142; but the descent is *sub modo* only, for the person who, on the defeat of the first given estate, is to take the devise over must not only have been the heir or representative of the executory devisee at the time of the latter's death, but must answer the description at the time the executory devise takes effect. See *Barnitz's Lessee v. Casey*, 7 Cr. 456, in which case STORY, J., said: "In such case, however, it does not vest absolutely in the first heir so as upon his death to carry it to his heir at law, who is not heir at law of the first devisee; but it devolves from heir to heir and vests absolutely only in him who can make himself heir to the first devisee at the time when the contingency happens, and the executory devise falls into possession. . . . Nor does it vary the legal result that the person to whom the preceding estate is devised happens to be the heir of the executory devisee; for though upon the death of the latter the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the execu-

tory devisee." But the law has been held in Delaware to be different, and the English rule, which is followed above, has been departed from, the Court holding that where an executory devise has descended, it will on the happening of the contingency vest in possession in the heir of the person who was last entitled to the devise had the preceding estate been defeated in his lifetime, without reference to whether the said heir were of the blood of the first devisee over or not, *Doe, Lessee of Kean v. Roe and Hoffecker*, 2 Harring. 103.

As a general rule, an interest which may descend may be devised, see *Jackson ex d. Varick v. Waldron*, 13 Wend. 178.

But where the person who is to take the executory devise is uncertain, as where there is a devise over on the death of the first taker, to "my grandchildren or the survivor of them," the devise will be neither descendible nor devisable, *Striker v. Mott*, 28 N. Y. 82; *Mott v. New York, Ontario and Western Railway Co.*, 45 N. J. Law 228; *Doe, Less. of Kean v. Roe and Hoffecker*, 2 Harring. 103.

Release by Executory Devisee.

It has been held that an executory devisee might release to one in possession, *Wilson v. Wilson*, 32 Barb. 328; but it is otherwise when the releasee is not in possession, even although the releasor and releasee are co-executory devisees of the estate, and *co-cestui que trustent* of the preceding estate. Thus, in *Striker v. Mott*, 28 N. Y. 82, there was a devise over "in case any of my said heirs and devisees shall die without lawful issue, then, and in such case, my will is, that the share of the one so dying shall be and inure to the sole use, benefit, and behoof of my said grandchildren, and the survivor of them, and the heirs of the survivor forever." A trust in the will prevented the grandchildren who were the devisees above-mentioned from taking a legal estate in their lifetime. The devisees, Ann, Garrit and Winifred Striker, made partition among themselves, and executed mutual deeds and releases. Ann died without issue, devising the part taken by her. It was held that Ann had no devisable estate; that the deed to her had passed nothing, for the releasor had no estate which could be conveyed, and the releasee no estate capable of being enlarged by a release, or of receiving the right.

A release, the taker of the executory devise being uncertain, cannot be made to a third person so as to act as an estoppel, *Pelletreau v. Jackson ex d. Varick*, 11 Wend. 110; S. C. on error *sub nom. Jackson ex d. Varick v. Waldron*, 13 Id. 178. In the Court of Errors, in this case, the question of the kind of interest which would or would not be subject to a release or convey-

ance, was very learnedly considered. The case arose upon the provisions of the will of Medcef Eden (see *supra*, p. 508). TRACEY, Sen., said: "For a long time the doctrine was maintained that some contingent interests, though descendible, were not devisable or conveyable; but I am not aware that the converse of this proposition was ever asserted. But, however this may be, it is now settled by authorities to which I shall presently advert, that descendible and devisable are convertible terms in respect to the qualities of contingent interests, and if so, a broad line of distinction can be traced between the contingency interest in the present case and in cases like that of *Moor v. Hawkins* (2 Eden Ch. 342). There the contingent interest being devised to C. and his heirs, it would, on the death of C., descend to his heirs, whose position in regard to it would be exactly that of their ancestor; consequently, under the rule that descendible and devisable are convertible terms, the power of C. to devise is undeniable. But in the present case it is obvious that the contingent interest of Medcef Eden was not descendible, because his death, which was the event necessary to cast the descent was that event which determined the possibility on which the estate was to be directed toward him. To suppose, therefore, that in the lifetime of his brother Joseph he had a devisable interest, would be supposing a case in palpable contradiction to the principle that descendible and devisable are convertible terms, and would, moreover, involve the absurdity of allowing him to transmit through his death the contingent possibility which it is the precise direction of his father's will that his death should determine.

"It seems to me, then, that however far the decisions may go to sustain devises of contingent interests, they do not aid the present case unless they go so far to maintain that interests too remote and naked for descent may yet be devised, a proposition which, I believe, has never been advanced; on the contrary, the struggle was for many years in the courts to establish a power to devise coëxtensive with that of descent, and the most that has been asked in behalf of contingent interests is that they should be held transmissible by the act of the party by devise or release whenever they are transmissible, by operation of law, by way of descent." The Senator then, after quoting Fearné, and referring to *Lampet's Case*, 10 Co. 46, continued: "If the books contained nothing more than such a general view of the doctrine without more apposite illustrations than this which Mr. Fearné gives, I could not yield up a persuasion which the most simple statement of the case is calculated to make, that Medcef Eden had an interest in the possibility of taking the estate as survivor to his brother. But I am bound to say the authorities are explicit and positive, that a grant to the survivor of two or more, gives to neither anything more than

a mere naked possibility before the contingency occurs." In support of this position were cited *Cro. Eliz.* 841; *Jones v. Roe*, 3 T. R. 88; *Selwin v. Selwin*, 1 Bl. 225; 2 Burr. 1131. In an earlier part of the opinion the Senator, in speaking of the character of the contingent estate under consideration, had said: "Both sides agree to call it a possibility, but disagree whether it were what the law terms a mere naked possibility, or a possibility coupled with an interest. On this point the case mainly turns, and the first object, therefore, is to ascertain the distinction between these two kinds of possibilities. The line of the distinction, to say the best of it, is extremely obscure, even if it be not confused and unintelligible. I do not mean by this that a broad distinction may not be shown between some cases that are given to illustrate a possibility, coupled with an interest, and others to illustrate a naked possibility; but, between cases approaching the line, it requires the keenest optics to detect the distinction. Thus the right or interest which one may have as heir apparent, or as heir presumptive, is very distinct from that one under a devise which gives him an estate in fee-simple, on the contingency that the first devisee dies without issue; for the heir, during the life of his ancestor, not only has no estate, but even if he survive him, he will not necessarily get any, in that the interest of the heir does not differ in its nature from that of an expectant devisee, which is an interest which every one may claim to have in another's estate. But in the other case the contingent devisee has a defined right in expectation which is independent of the volition or caprice of any other; and on the happening of a contingency which Providence alone controls, he must come to the enjoyment of the full estate."

The last quoted and first uttered portion of the opinion would seem to establish a rule, which the learned Senator did not follow in his conclusion, that a devise over to a survivor, not named, was not such an interest as could be released by one who might or might not be that survivor, according as the contingency happened; nevertheless, this was the opinion of the majority of the Court, and WALWORTH, Ch., who dissented, could command the support of five senators only against thirteen. The decision, however, after standing for a long time, was finally overruled in the case of *Miller v. Emans*, 19 N. Y. 384, in which the question arose upon a devise taking effect in 1810, by which the testator left lands in fee to his three sons and four daughters, with a devise over upon the death of any one of them without issue of his or her share to the survivors. The daughters released their interests to their brothers, and the question before the Court was the validity of the release by one of the daughters. Opinions were delivered by SELDEN and STRONG, JJ., on behalf of the majority of the Court, and by DENIO, J., dissenting.

SELDEN, J., regarded the statement of the law in Sheppard's Touchstone 322, "a remote possibility that is altogether *uncertain* cannot be released," as erroneous in resting the non-releasibility on the uncertainty of enjoyment of the interest released, and while admitting the examples of void releases given in the Touchstone, viz., a release by the son of a disseizee to the disseizor in the lifetime of the parent, a release by the conusee of a statute of his right to the land of the conusor before execution, and a release by the plaintiff to bail in the King's Bench before judgment, to be well put, argued that the releases mentioned were all void on grounds other than uncertainty, pointing out that in each of the two latter cases the release was of a thing not in existence. As to the first he said: "Again, it is not the uncertainty that prevents the operation of the release in the first of the three cases put by Sheppard. That case seems to have been taken from Littleton (§ 446), where it is stated as follows: 'For if there be father and son, and the father be disseized, and the son (living the father) releaseth by his deed to the disseizor all the right which he hath or may have in the same tenements, without clause of warranty, etc.; and after the father dieth yet the son may lawfully enter upon the possession of the disseizor; for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father.'

"Littleton has been understood here to rest the invalidity of the release upon the contingent and uncertain nature of the right, although this is not the precise import of his language. But there is an obvious reason why the release would be void aside from that which he gives. The case supposed is one where the release must operate, if at all, *per mitter le diort*, because the releasee is a trespasser, and has but a naked possession and no right. It must make that possession rightful which before was wrongful. The whole operation of such a release is based upon the idea of legitimatising a wrongful possession. Hence, it is said in Jacob's Law Dictionary (Title Release): 'It is necessary in all cases where a release of lands is made that the estate be *turned to a right*, as in a *disseizin*, etc., where there are two rights, a right of possession in the disseizor and a right to the estate in the disseizee.'

"No release can be valid which does not unite these two rights, and hence no one can release to the disseizor but the disseizee himself. The heir of the disseizor cannot release, because he has no present right to the estate, and the possession of the disseizor would remain as wrongful after the release as before. The father might still enforce his right and oust the disseizor, and then the release would be the same as if made to a stranger contrary to the settled rules on the subject." The learned Judge then

proceeded to an examination of *Lampet's Case*, 10 Co. 51, to which he considered it not unlikely the idea that mere uncertainty of right presented an obstacle to a release owed its currency, and pointed out that in the example given in that case the release was made to a trespasser by the eldest son of the disseizee, and that the case cited therein from 17 Eliz. was that of a grant of a greater estate than the grantor had, and that if considered as the release of a contingent right, it was void as being to a stranger, and came to the conclusion that, as the reason generally given why contingent estates, while not alienable to strangers, were releasible to terre tenants, was their tendency to create repose and quiet, it would be found, whenever the subject was fully examined, that "any and every contingent right, however uncertain, may be released to a party already seized of a present estate in the premises in possession, and that the mere remoteness of the contingency affords no objection to its being so released, provided the right can be said to have any present existence at all."

STRONG, J., in his opinion, considered the case of *Jackson ex d. Varick v. Waldron*, and criticising the opinion therein, said: "Senator Tracey came to the conclusion that if the person who was to succeed to the estate had been definitely named, then he might have released his right; but that where there is (as there was in that case) a devise of a possibility to the survivor, there was no designation of the person, and that, therefore, there was nothing which either could release. He quoted Chancellor KENT, who says, 4 Com. 262: 'If the person be not ascertained, they are not then possibilities coupled with an interest.' But was that principle applicable to the case which the Senator was discussing, or is it applicable to that which I am now considering? In all cases, one having a possibility may never succeed to the estate. The question in most cases is whether the person who may have the estate upon a specified contingency is designated. If so, it matters not what the contingency may be, whether of survivorship or of any other circumstance, there is a right in the person named. The confusion in the mind of the learned and eloquent Senator in the case of *Jackson v. Waldron* was caused by the fact that in that case the right by survivorship was common to two. Had the contingency by which the estate was to vest in one of the brothers been the prior death without legal issue of any other person, he would not have supposed that there could have been any more than the ordinary uncertainties upon which executory devises are made to depend. In the case under consideration there was a devise to Mrs. Miller upon the contingency that she should survive either of her brothers or sisters who should die *sine prole*. There was clearly a designation of the person who was to take on those events. The uncertainty which accompanies a mere naked possibility is as

to the person who may succeed to the estate upon the occurrence of the contingencies. In this case there is none. I repeat it, survivorship to a contingency, and all that is necessary in order to attach an interest, is that, in the event of one person outliving another, the devisee should be designated."

COMSTOCK, GROVER, and ALLEN, JJ., concurred in the opinion of SELDEN, J. COMSTOCK and GROVER, JJ., also concurred in the opinion of STRONG, J. DENIO, J., dissented.

Effect of Void Executory Devise on Preceding Estates.

Where an executory devise is void, whether as violating the rule against perpetuities, or as upon an immoral condition or otherwise, the preceding estate will not be affected thereby, *Den ex d. Trumbull v. Gibbons*, 2 Zab. 117, except that where there is no alternative limitation, and the first devise is of a fee, that fee will become absolute, *Moore's Trustees v. Horne's Heirs*, 48 B. Mon. 199; *Church in Brattle Square v. Grant*, 3 Gray 112 (*ante* Vol. I., at p. 181). And see also *Jackson ex d. Staats v. Staats*, 11 Johns. 337.

Effect of Vesting of Executory Devise.

It has been held that where the executory devise becomes vested in possession, the character of any limitations subsequent thereto, although prior to the vesting they, under the rule, as given in *Fearne*, p. 503, were also executory, becomes changed, and the limitations thereafter become remainders. See 2 Saund. Rep. 388 *i*, note 9: "With regard to executory devises, it is a rule that whenever one limitation of a devise is taken to be executory, all subsequent limitations must likewise so be taken. However, it seems to be established that whenever the first limitation vests in possession, those that follow vest in interest at the same time, and cease to be executory and become mere contingent remainders, and subject to all the incidents of remainders." In the case of *Lion v. Burtiss*, 20 Johns. 483, where there were devises to two brothers, with devises over to the survivor on the death of either without issue, "and in case of both their deaths without lawful issue," over to the testator's brother and sister and their heirs; it was held that the first limitation over having taken effect by the death of one of the brothers without issue, the executory devise became a vested tail, which, being by statute converted into a fee, the devises over, now converted into remainders, were barred. The apparent breadth of this rule should, it seems, be confined to those cases in which there is a connec-

tion between the devise which has vested and the devise over—to those which “follow” the first devise not only in point of time, but in the sense of being dependent on it.

In *Vedder v. Evertson*, 3 Paige 281, WALWORTH, Ch., thus limits the generality of the statement: “The principle, however, that the second limitation vests in interest and ceases to be executory whenever the first executory limitation vests in possession, is confined to cases where the second or subsequent limitation can vest as a valid remainder, and therefore cannot be good as an executory devise; or where the subsequent limitation in itself never could have been valid as an executory devise, being founded or dependent upon a contingency too remote. And it cannot be applied to a case where such succeeding limitation is in itself valid as an executory devise, but could not take effect as a remainder for want of a particular estate to support it.” The learned Chancellor also said that he had examined all the cases with reference to the subject which were referred to by SPENCER, C. J., who did not note the distinction in *Lion v. Burtiss*, and found them all cases where the subsequent limitations were in themselves valid as remainders, or where they could not take effect as executory devises on account of their violation of the rule against perpetuities.

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